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REPORT OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

CHRISTOPHER ROBINSON, Q.C.,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOL. XXV.

CONTAINING THE CASES DETERMINED
FROM TRINITY TERM 29 VICTORIA TO TRINITY TERM 30 VICTORIA
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS.

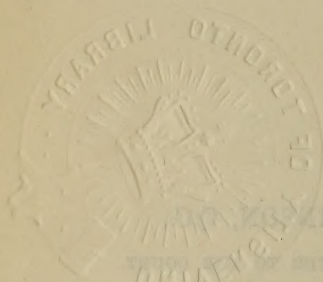
CARSWELL AND CO.,
TORONTO AND EDINBURGH.
1881.

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REPORT OF CASES

FORWARDED BY THE

COURT OF QUEEN'S BENCH.



MUIR, PATERSON AND BRODIE, PRINTERS, EDINBURGH.

VOL. XXV.

CONTAINING THE CASES REPORTED
FROM TWENTY-NINE TO THIRTY-ONE OF OCTOBER
WITH A TABLE OF THE NAMES OF CASES AND THE
AND INDEX OF THE SUBJECTS OF MATTER.

GARSWILL AND CO.
TORONTO AND EDINBURGH.

1881

JUDGES

OF THE

COURT OF QUEEN'S BENCH

DURING THE PERIOD OF THESE REPORTS.

THE HONOURABLE WILLIAM HENRY DRAPER, C.B., Chief Justice.

„ „ JOHN HAWKINS HAGARTY, J.

„ „ JOSEPH CURRAN MORRISON, J.

Attorney-General.

THE HONOURABLE JOHN ALEXANDER MACDONALD.

Solicitor-General.

THE HONOURABLE JAMES COCKBURN.

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REPORT OF CASES
IN THE
COURT OF QUEEN'S BENCH.

TRINITY TERM, 29 VICT. 1865 (*continued*).

Present :

THE HON. WILLIAM HENRY DRAPER, C.B., C.J.

„ „ JOHN HAWKINS HAGARTY, J.

„ „ JOSEPH CURRAN MORRISON, J.

RANDALL ET AL. *v.* BURTON ET AL.

Sci. Fa.—Bond, construction of—Payment by yearly instalments, with interest on unpaid principal—Mode of computing interest.

Sci. Fa. on a bond conditioned to pay \$2782·68, in five equal annual instalments, with interest on the whole amount from time to time remaining due, on the 1st of June in each year. The declaration recited that the first instalment and interest due on the 1st of June 1862 had been paid; that on the 30th November 1864 damages were assessed for the second and third instalments, and interest on the unpaid principal, \$2226, up to the 1st of June 1864, which were paid on the 15th of April 1865; that there was afterwards a further breach by non-payment of the fourth instalment of principal on the 1st of June 1865, with interest on the said \$2226 from the 1st of June 1864 to the 15th of April 1865, and interest from said 15th of April on the principal remaining unpaid on that day to the 1st of June 1865. The plaintiffs claimed execution for the damages to be assessed on this further breach.

Held, that interest on the \$2226 could not be recovered for the plaintiffs on their *sci. fa.*, for the second and third instalments should have assessed all damages for non-payment of such instalments up to the date of that *sci. fa.*, 30th November 1864, which would include interest; and their execution for such damages would bear interest also.

Held, also, that the objection might be taken by demurrer to so much of the breach as claimed such interest; for the award of execution being claimed for three separate sums, each claim might be treated as the assignment of a separate breach.

Scire facias, on a judgment recovered upon a bond made by defendants, in a penalty of \$3000, conditioned to pay \$2782·68, with interest, in five equal annual instalments, with interest on the whole amount “from time to time

remaining due," on the 1st of June in each year, the first payment to become due on the 1st of June 1862. The declaration recited that the plaintiffs had in the action assigned a breach for non-payment of the instalment and interest due on the 1st of June 1862; that damages were assessed thereon, which had been since paid; that on the 30th of November 1864 the plaintiffs sued out a *sci. fa.* on the judgment for non-payment of the second and third instalments, and the interest for two years from the 1st of June 1862 on \$2226·15, the balance of the principal sum; and damages amounting to \$1380·18 were thereupon assessed, which damages afterwards, to wit, on the 15th of April 1865, were paid; that after that last assessment there was a further breach of the condition by non-payment of \$556·53 on the 1st of June 1865, being the fourth annual instalment, "together with interest therein also mentioned on the whole amount from time to time remaining due—that is to say, interest from the 1st of June 1864 until the 15th of April 1865 on the said sum of \$2226·15, and interest from the said 15th of April 1865 until the 1st of June 1865 on \$1113·06, being the balances and whole amount of the said principal sum from time to time remaining due, for which said last-mentioned breach, being *another and further breach* of the condition" than the breaches already assigned, for which damages have been assessed, the plaintiffs issue this *sci. fa.*; and the plaintiffs pray execution for the damages to be assessed on the last-mentioned further breach.

The defendants said nothing against the award of execution for so much of the last-mentioned breach as related to the \$556·53 due on the 1st of June 1865 with interest on \$1113·06 "therefrom" until the 1st of June 1865; and as to the residue of the breach they demurred, on the ground that the claim for interest on \$2226·15 is not warranted by the condition of the bond.

Burton, Q.C., for the demurrer, cited 1 Wms. Saund. 286, note 10; *M'Michael*, contra, cited *Reindel v. Schell*, 4 C. B. N. S. 97.

DRAPER, C.J., delivered the judgment of the court.

The defendants rest the demurrer substantially on the ground that it is admitted the second and third instalments were paid *after* the issuing of a *sci. fa.* in which it was assigned as a breach of the condition of the bond that these instalments, and the interest of the principal sum remaining due when these instalments fell due, had not been paid; that the plaintiffs should have and must be assumed to have assessed all their damages for the non-payment of these two instalments up to the date of their *sci. fa.*, 14th November 1864, and such damages would include the interest, and they could indorse their execution for the damages assessed, with a direction to the sheriff to levy interest on those damages up to the time of payment; that the non-payment of interest on these two instalments after they fell due was rather a damage arising from the breach of the condition than an actual breach of it; and that, as to the interest on the unpaid principal beyond the amount of the first, second, and third instalments, that became due only on the 1st of June in each year, when an instalment would become due, and that no part of the interest on the amount of instalments not yet due could become due at a period less than a year from the falling due of the next preceding instalment, when interest on the whole balance then remaining due would be payable.

We think this view is correct. If this breach is properly assigned, then the plaintiffs might have issued a *sci. fa.* on the 15th of April 1865 for the interest on \$2226.15, from the 1st of June 1864 up to the 15th of April, instead of waiting for the following 1st of June, when the next instalment fell due. For, in our opinion, the words "from time to time" refer to the days of payment named, namely, the 1st of June in each and every year, and not to any day in the year on which there is an unpaid balance of principal not yet due; and therefore we think the assignment of this breach for non-payment of interest is not warranted by the condition.

There may be some difficulty as to a demurrer being the proper mode of bringing up the question. Upon the best

consideration we can give we think it may be done. The award of execution is claimed for three distinct sums: 1st, the instalments; 2nd, the interest from the 1st of June 1864 to the 15th of April 1865; 3rd, the interest from the 15th of April 1865 to the 1st of June 1865. This division makes each claim independent of the others, and we see no good reason why each claim may not be treated as the assignment of a separate breach. If the plaintiffs had assigned a breach for the non-payment of interest in general terms, claiming its payment broadly according to the condition, the defendants might not have been able to raise the question by analyzing the breach, and, assuming it to consist of different parts, demurring to a part of it. The question could then, perhaps, only have arisen on the assessment, or by a plea alleging payment of part and confessing the residue, but in the present form of assignment we have arrived at the conclusion that the defendants, objecting to the whole of one of the separate claims, may raise the objection by demurrer.

The defendants, therefore, should have judgment.

Judgment for defendants on demurrer.

IN THE MATTER OF DAVID HARTLEY AND THE CORPORATION OF THE TOWNSHIP OF EMILY.

Temperance Act of 1864.

Where a by-law was passed under "*The Temperance Act of 1864*," having been adopted by the electors at a meeting at which the township clerk took the poll and conducted all the proceedings, no person presiding thereat as directed by section 3, sub-section 3,—*Held*, that the provision was imperative; that in the absence of the person appointed to preside no poll could be legally taken; and the by-law therefore was quashed, with costs.

Although no one appeared to show cause, the court, having regard to the evident intention of the legislature to sustain such by-laws unless clearly bad, would not make the rule absolute without seeing that the objections were fatal.

In Easter term *C. S. Patterson* obtained a rule, calling upon the Corporation of the Township of Emily to show cause why the by-law submitted to the electors of the said

township on the 9th and 10th of January 1865 for adoption under "*The Temperance Act of 1864*" should not be quashed, on the grounds, first, that no person presided at the meeting in pursuance of the 3rd sub-section of section 3 of the said statute; and, second, that the township clerk closed the poll on the second day before all the electors had polled their votes, and before the hour of five o'clock in the afternoon.

These objections were sustained by affidavits, stating that although the reeve was present at a part of the meeting, neither he nor any municipal councillor or municipal elector presided thereat, nor was any person chosen to preside; but the township clerk took the poll, and conducted the proceedings without any person presiding thereat; and that he opened the poll on the second day, and closed it finally at or about thirty minutes after three o'clock in the afternoon of such second day, alleging as his reason for so finally closing the same that more than half an hour had elapsed without any vote having been offered, although before so closing he was informed, as the fact was, that several duly qualified voters were then coming for the purpose of voting, and was requested not to close the poll, in order to give them an opportunity to vote.

It further appeared that on the poll-book was indorsed a certificate as follows: "We, the undersigned, do hereby certify that one hundred and eleven voted yea, and fifty-nine nay, at the meeting called on the 9th and 10th days of January 1865 to pass the Temperance by-law.

"(Signed) { , *Chairman.*
ROBERT GRANDY, *Township Clerk.*"

This rule was served on the township clerk and on the reeve of the township. Copies of the affidavits on which the rule was granted, and a notice that they were such copies, were also served on the clerk. The rule was enlarged until this term, and was then moved absolute.

No one appeared to oppose its being made absolute.

DRAPER, C.J., delivered the judgment of the court.

In matters of ordinary proceeding in a cause, we should

probably make a rule absolute which, having been duly granted and regularly served, was not opposed by the party called upon to show cause. In the present case, however, looking at the tenor and spirit of "*The Temperance Act of 1864*," we deem it our duty to see that the objections raised are sustained in fact by the affidavits, and if so, that they are sufficiently in accordance with the statute to call for the by-law being quashed; for considering that the 37th section of the Act declares that no by-law passed under its authority shall be set aside for any defect of procedure or form whatever; and that no by-law adopted by the electors of a municipality under the 4th and 5th sections of the Act shall be set aside for any defect whatever, whether of form or substance, affecting the requisition therefor, the authenticity or number of the signatures thereto, the qualification of the signers thereof, or any matter, thing, or procedure antecedent to the first publication of the notice given for the poll taken, unless the same be unauthorized by the Act; we can scarce doubt that the legislature desired to sustain all such by-laws unless there were very clear and very substantial grounds for setting them aside. This by-law was adopted under the 4th and 5th sections of the statute.

When the rule was moved absolute, I was doubtful whether we might not treat the provisions of the 3rd sub-section of section 5, in respect to the person who should preside at the meeting for taking the poll, as directory only, and that provided some person did preside it would be sufficient. My attention was not called to the statement in the affidavit of Thomas Stephenson, that "the said township clerk took the poll, and conducted all the proceedings of the said meeting without any person presiding thereat." Now under section 97 of the Municipal Institutions Act, sub-section 7, it is the returning officer who is to close the poll, as well as adjourn it, when an adjournment is required. This duty is to be performed by the person who presides, and he is also, under sub-section 8 of section 5 of the Temperance Act, to count the yeas and nays, and to ascertain and certify on the face of the poll-book the number of votes given for and against the by-law, and the certificate is to be countersigned by the poll clerk, who would usually be the township clerk;

and by section 6 every by-law so passed is to be communicated by delivery of a copy certified by the township clerk to the collector of inland revenue.

The first objection is certainly sustained in fact, and the more I consider it the more substantial it appears to me. It cannot be mere matter of procedure or form that there should be no person presiding at the meeting, in whom is vested the authority for conducting the election and for maintaining peace and order, to whom the legislature has intrusted the counting the votes and certifying the result. In the absence of any such person I do not see how a poll can be taken under the statute, or the result legally ascertained. The township clerk has, to a great extent, assumed an authority not conferred upon him, and (without questioning his motives) he has shown more zeal than discretion in this matter.

We cannot hesitate in deciding that on this objection the rule to quash the by-law must be made absolute with costs. If the statute gave the authority, we should be disposed to add to be paid by the township clerk, but the corporation must bear the loss caused through the officiousness of their officer.

Rule absolute.

STEWART v. KAY.

Dower.

Dower may be maintained against a mortgagee in fee, although he is not in possession, and the mortgage entitles the mortgagor to hold until default, which has not been made.

DOWER—*Plea*, Non tenuit.

At the trial at Stratford, before the learned judge of the County Court, acting on the last day of the assizes for *Hagarty, J.*, it appeared that the defendant was mortgagee in fee of the land in question, under a mortgage executed to him by the demandant's husband on the 22nd of February 1864 to secure payment of \$400 in five years, with interest yearly. The mortgage contained a proviso for possession by the mortgagor until default. Defendant was not in possession, and it was admitted that there had been no default up to the commencement of this suit.

It was objected that, under these circumstances, the defendant not being in possession nor having any right to

it, the action could not be maintained against him; and a verdict was taken for the demandant, with leave to defendant to move to enter a verdict in his favour.

Adam Crooks, Q.C., during last term, obtained a rule *nisi* accordingly, citing *Cumming v. Alguire*, 12 U. C. R. 330; *Ham v. Ham*, 14 U. C. R. 497; *Bell on Husband and Wife*, 274, 279, 310; *Roper on Husband and Wife*, vol. i. p. 429, 437; *Coote on Mortgages*, 3rd ed. 510; *Park on Dower*, 265, 266, 285; *Kent Com.* vol. iv. p. 106; *Duke of Hamilton v. Lord Mohun*, 1 P. Wms. 121.

In this term *McCarthy* showed cause.

C. Robinson, Q.C., supported the rule, referring to *Walker v. Boulton*, 6 O. S. 553; *McClellan v. Meggott*, 6 U. C. R. 551; *Cumming v. Alguire*, 12 U. C. R. 332; *Pulker v. Evans*, 13 U. C. R. 546; *Harris v. Stratton*, 17 U. C. R. 520; *Bac. Abr.* "Dower" D.; 24 Vict. ch. 40, secs. 2, 8, 13; *Runyan v. Mersereau*, 11 Johnson, 534; *Evertson v. Sutton*, 5 Wend. 295; *Sm. Lea. Cas.* 3 Am. Ed. vol. i. p. 493, 494.

DRAPER, C.J.—We have examined the cases in our own court cited upon the argument, which, in our opinion, decide the question raised in favour of the demandant. The point is therefore not open for discussion here, and the defendant must appeal if he desires to dispute the soundness of these decisions.

Rule discharged.

IN THE MATTER OF APPEAL BETWEEN ARTHUR STEWART, APPELLANT, AND JAMES BLACKBURN, RESPONDENT.

Conviction—Appeal to Quarter Sessions—Certiorari.

Where a defendant having been convicted on the information of a toll-gate keeper of evading toll, appealed to the Quarter Sessions, where he was tried before a jury and acquitted, this court refused a writ of *certiorari* to remove the proceedings, the effect of which would be to put him a second time upon his trial.

On the 6th of February 1865, on the information and complaint of James Blackburn, a gatekeeper on the Rond Eau and St. Clair Gravel and Plank Road, Arthur Stewart was convicted, before a justice of the peace of the county of Kent, of passing a check-gate on the said road without paying toll.

He appealed to the Quarter Sessions, and demanded a jury, before whom the case was tried, and a verdict rendered in his favour, at the sittings in March 1865.

In Easter term *J. H. Cameron, Q.C.*, moved for a writ of *certiorari*, to bring before this court all the proceedings of the Quarter Sessions on such appeal.

The court expressed doubts whether, after an acquittal, such process should be ordered, at all events at the instance of a private prosecutor; but they granted a rule *nisi*, which was accordingly issued, calling upon the chairman of the Quarter Sessions and the clerk of the peace.

During this term *M'Bride* moved the rule absolute. No one appeared to show cause.

The court, however, after taking time to consider, refused to grant the writ, saying that if the Quarter Sessions had deemed it advisable they might have reserved any questions of law arising for the opinion of this court, under Consol. Stat. U. C. ch. 112; and that the effect of granting this application would be to put the appellant again upon his trial, for which no authority had been cited. The circumstances of the case, they remarked, were not such as to call for any extraordinary interference, and the question as to the right to charge the toll could easily be raised in another form.

The CHIEF JUSTICE, having been absent when the rule was moved absolute, took no part in the judgment.

Rule discharged.

MEMORANDA.

During this term the following gentlemen were called to the bar: ARTHUR RADCLIFFE BOSWELL, FRANK JOHN JOSEPH, PATRICK WILLIAM DARBEY, DUNCAN SHADE GOODING, CHRISTOPHER FINLAY FRASER, JOHN ALEXANDER KAINS, JOHN BURNHAM, JOHN MILNE BRUCE, ANDREW THOMAS DRUMMOND, GEORGE MILNES MACDONNELL, DONALD BAN MACLENNAN, WILLIAM HUGH M'CLIVE, WILLIAM BALDWIN THIBODO, RICHARD GRAHAME, GEORGE SMITH HOLMESTED, JOHN DOUGAN, JAMES HARRIS GILBERT, CORNELIUS VALLEAN PRICE.

IN THE

COURT OF QUEEN'S BENCH,

AND THE

COURT OF COMMON PLEAS.

Regulæ Generales.

During this term the following Rules were read in Court:—

Trinity Term, 29th Victoria.

The Rules of Court, under the head of "New Trial List," numbers one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve, passed in Michaelmas Term, 27th Victoria, shall be, from and after the first day of Michaelmas Term next, annulled, and the following Rules shall come into force and take effect upon and after the first day of Michaelmas Term next:—

NEW TRIAL LIST.

I. The party who obtains any rule *nisi* for a new trial, or for entering a nonsuit, or a verdict, or for increasing or reducing a verdict, on leave reserved, may, on or after the fourth day, inclusive, after the serving such rule, file the same, together with an affidavit of service, with the Clerk of the Court granting such rule.

II. The party served with any such rule may (if the same has not been already filed by the party who obtained the same), on or after the fifth day after the granting of the rule, file the copy served, with an affidavit of the fact and time of such service, with the Clerk of the Court granting such rule.

III. In case the party to whom any such rule is granted shall neglect or delay to draw up and serve the same, the opposite party may, on or after the third day after the granting such rule, and upon filing with the Clerk an affidavit that the rule has not been served, enter a *ne recipiatur* with such Clerk, after which the Clerk shall not receive or enter such rule in the book hereafter required to be kept by him, and such rule shall be deemed to be abandoned, and the opposite party may proceed as if no such rule had been moved for or granted.

IV. The Clerk shall, immediately on the receipt of any rule or copy under the first or second rules, enter a memorandum thereof in a book to be kept for that purpose, in the order in which the same shall be delivered to him, such memorandum to be according to the form following :—

_____ *Term* (YEAR).

Plaintiff's Name.	Defendant's Name.	Description of Rule.	When filed with the Clerk.	How dis- posed of.

V. On the first Saturday, the second Tuesday, and the second Friday of every Term the Court of Queen's Bench, after going through the Bar to hear motions for rules *nisi*, or motions of course, will hear the rules so entered, according to the order in which they stand, in preference to any other business; and on the first Friday, second Monday, and second Wednesday of every Term the Court of Common Pleas will, after going through the Bar to hear motions for rules *nisi*, or motions of course, hear the rules so entered according to the order in which they stand, in preference to any other business. The causes to be heard each day to be those on the list as it stands at the opening of the Court.

VI. Each Court, in its discretion, will hear any rule so entered when both parties are present and prepared to proceed.

VII. If, when a rule is called on in its proper order, the party who obtained the same does not appear to support it,

and the opposite party attends and applies to have it discharged, such rule may be discharged accordingly.

VIII. If the party called upon to show cause does not appear when the rule is called on in its proper order, the Court will hear the other side, *ex parte*, and dispose of the rule.

IX. If neither party appear, the rule may, in the discretion of the Court, be treated as having lapsed, and be struck out of the Clerk's books.

X. In the absence of other business, the Courts may, in their discretion, hear rules so entered on any other days during Term, beside those mentioned in the fifth rule, the parties to the rule being present and desirous to proceed.

XI. Each Court will, on sufficient ground shown, upon affidavit, enlarge a rule so entered to a subsequent day in the same Term, or to the following Term, and the Clerk shall alter the entry accordingly, and place the enlarged Rule at the foot of the list.

XII. All rules entered by the Clerk as aforesaid, which remain unheard at the end of any Term, shall be enlarged as of course, on filing a motion paper to that effect, to the following Term, and shall be forthwith re-entered in the Clerk's book, in the order in which they then stand, for hearing in the next ensuing Term.

XIII. The Court may, nevertheless, in any case, if it shall see fit so to do, make any special rule or order, or give any special direction upon or with respect to any such rule, or the entering, taking out, or service thereof, or with respect to any supposed lapse or abandonment thereof, or otherwise, as it might have done before the passing of these or the rescinded rules.

Dated 9th September, A.D. 1865.

(Signed) WM. H. DRAPER, *C.J.*
WM. B. RICHARDS, *C.J., C.P.*
JOHN H. HAGARTY, *J., Q.B.*
JOS. C. MORRISON, *J., Q.B.*
ADAM WILSON, *J., C.P.*
JNO. WILSON, *J., C.P.*

MICHAELMAS TERM, 29 VICT. 1865.

(November 20th to December 2nd.)

Present :

THE HON. WILLIAM HENRY DRAPER, C.B., C.J.

„ „ JOHN HAWKINS HAGARTY, J.

„ „ JOSEPH CURRAN MORRISON, J.

BOULTON v. THE CORPORATION OF THE UNITED COUNTIES
OF YORK AND PEEL.

*Sale of land for Taxes—Payment of redemption money under protest—
Right to recover back.*

Where lands were sold for taxes, and after the expiration of a year the owner paid under protest to the County Treasurer the sum required to redeem them.

Held, that he could not recover this sum from the County as money had and received, for under section 148 of the Assessment Act it was received, not for his use, but for that of the purchaser; and the payment of redemption money, to deprive the purchaser of his rights, must be unqualified.

APPEAL from the County Court of York and Peel.

This was an action for money had and received, to which the defendants pleaded never indebted and payment.

It appeared that certain lands in the township of Whitchurch, which had been granted by the Crown, and of which the plaintiff was owner, had been charged with taxes in the assessment rolls for the years 1852-53-55-56-57 and 1859, and had been sold by the sheriff to one Walkington. The taxes up to 1861 were \$106.93, and by the addition of ten per cent. for non-payment, authorized by the statute amounted at the time of the sale to \$130.59, and they remained unpaid up to the day of sale and of the return of the warrant of sale.

This latter sum the sheriff paid over to the treasurer of

the United Counties (the defendants), and he paid it over to the municipality of the township of Whitechurch.

On the 9th of February 1865, which must have been within a year from the sheriff's sale (though this fact was not distinctly stated), the plaintiff paid to the defendants' treasurer under protest the sum of \$164.64 in redemption of these lands. The treasurer gave him a receipt according to the terms of the statute.

Objection had been made to the sale at the time thereof. Walkington received the usual certificate of the sale to him from the sheriff, and the treasurer paid over the money which he received from the plaintiff to Walkington.

On this evidence the plaintiff was nonsuited, and the nonsuit was upheld by the learned judge of the County Court sitting in term. The appeal was against this decision.

J. H. Cameron, Q.C., for the appellant. *M. Michael*, contra.

DRAPER, C.J., delivered the judgment of the court.

The only question I have thought it necessary to consider is, whether this money was received by the *defendants* to the plaintiff's use. If it was not, then the nonsuit was right.

The question arises under the 148th section of the Assessment Act: "The owner of any land which may hereafter be sold for non-payment of taxes may at any time within one year from the day of sale, exclusive of that day, redeem the estate sold by paying or tendering to the county treasurer, *for the use and benefit of the purchaser* or his legal representatives, the sum paid by him, together with ten per cent. thereon, and the treasurer shall give to the party paying such redemption money a receipt, stating the sum paid and the object of payment, *and such receipt shall be evidence of the redemption.*"

It is difficult to conceive how the treasurer, in the face of this enactment and of the receipt which the law required him to give, could have resisted an action brought by Walkington for the money paid by the plaintiff. It could

only have been on the ground that the receipt by the treasurer was a receipt by the defendants, and that they were liable to Walkington, for unless upon this ground the action would be sustainable.

The owner of the land may prevent the sale by paying the sum charged against it to the treasurer (section 112). He may make this payment under protest, and contest the legality of the demand; but after the warrant for sale has been issued, the treasurer cannot receive it (section 126) as a payment to the municipality. Thenceforth he can only receive under authority of section 148, "for the use and benefit" of the purchaser, and this limitation, to my judgment, establishes that the receipt of "redemption money" by the treasurer is not a receipt by the municipality, whose claim for taxes must be presumed to have been satisfied one month after the sale of the land (section 143).

The payment by the owner before sale of his land is a payment of taxes, after sale it is a payment of redemption money; and the redemption is not from the municipality, whose demand is satisfied, but from the purchaser, who has paid his purchase money, and has absolutely acquired a right to have it returned within a year, with a fixed increase, or to have the land sold conveyed to him, a payment to the treasurer being payment to him; and, as appears to me, the payment or tender of payment to the treasurer (section 142) must be unqualified, in order to deprive the purchaser of his rights. We cannot hold that the owner, whose neglect before the sale has rendered that step necessary, can by paying redemption money under protest indefinitely delay the purchaser from getting back his redemption money or a conveyance of the land.

Appeal dismissed, with costs.

IN THE MATTER OF ROBERT MUNN.

Committal under C.S. U.C. ch. 26, sec. 41—Application for discharge on habeas corpus—Irregularities—Enlarging summons after return day, etc.

A county court judge, on the 4th of September, granted a summons calling on a judgment debtor to show cause why he should not be committed to the county gaol of Middlesex, for not satisfactorily answering as to his estate and effects, etc., on an examination before a commissioner appointed by the judge. This summons having been enlarged until the 26th of September, and no one attending on either side on that day, the judge, *on the following day*, on the plaintiff's application, enlarged it by indorsement until the 11th of October, of which the defendant had no notice. On the 11th of September the judge had made another order for the debtor to attend before him, and be further examined on the 11th of October; but the defendant having lost this order, and believing it to be only a summons for further examination, on which an order would be afterwards made, did not attend upon it. On the 11th of October the judge made an order *upon the summons of the 4th of September* for the defendant's committal to the county gaol of Lambton, where he had resided since before the date of that summons. Defendant having been committed, applied for his discharge to the judge of the county court, who refused, unless he would undertake to bring no action; and an order was signed for his discharge on these terms, which he declined to accept. The prisoner having been brought up by *habeas corpus*, it was objected—

1. That the summons having lapsed on the 26th, could not be enlarged.
2. That the summons was to commit to the county gaol of Middlesex, and the order to that of Lambton.
3. That the order of the 11th of September, for further examination, was a waiver of the previous summons to commit.

Held, that such enlargement, under all the circumstances, could not entitle defendant to his discharge; that the second objection could have been available only on the return of the summons; and that the order was no abandonment of the previous summons. The defendant was therefore remanded.

Remarks as to the inconvenience, if not danger, of making the writ of *habeas corpus* a mere method of appealing from other tribunals on points more of practice than affecting the merits.

The rule for defendant's discharge, as above mentioned, was returned to the writ of *certiorari*, with a certificate by the judge that it had been refused by the defendant's attorney. *Held*, that being so refused it was as if it had not been granted.

Quere, as to the validity and effect of the words in such rule restraining defendant from bringing any action.

A writ of *Habeas Corpus*, issued on the 24th of November 1865 to the sheriff of Lambton, who returned that the prisoner was detained by virtue of an order of the judge of the County Court of Middlesex, annexed.

The order was entitled in a cause in that County Court of Thomas Irving *v.* William Carson and Robert Munn. It recited a judgment recovered in that cause for £28, 18s. 7d., and that afterwards, on the 8th of July 1865, the judge, sitting in Chambers at London, under section 41 of ch. 24,

Consol. Stat. U. C., made an order, signed by him, that Munn should be orally examined upon oath before Edward D. Parke, Esq., at the City of London, in the County of Middlesex, within the jurisdiction of which Munn then resided, touching his estate, etc., and as to the means he had when the liability in the action was incurred, and as to his means of payment and his disposition of property since contracting such liability; and Munn having attended and been orally examined on oath, and Parke having returned the order, with the examination and his report, the judge, on the 4th of September 1865 in chambers, granted a summons in writing, calling on Munn to show cause before him at his chambers in London why he should not be committed to the county gaol of the County of Middlesex for such period, etc.; and the summons having been served on defendant, and duly enlarged until the 9th of September, was on that day again enlarged until the 26th of September, and after reading the affidavits filed by both parties, was again enlarged until the 11th of October 1865; and the judge having made an order for the further examination of Munn in the meantime, and that order having been duly served upon him, and Munn not appearing before the judge on the return day thereof, as thereby required, the judge, upon reading the order, examination, report, and proceedings, and the summons and affidavit of service thereof, and no further cause being shown, did adjudge that the defendant had not made satisfactory answers respecting his property and means, and that it appeared to the judge from such examination that Munn had concealed or made away with his property in order to defeat or defraud the plaintiff, because he stated that he was able to pay the debt, but was unwilling to do so, and did not disclose what his means consisted of, or how they were disposed of. And the said judge ordered and adjudged that Munn be committed to the common gaol of the County of Lambton (the county in which the said Munn then resided) for twelve calendar months from the time of his arrest.

Dated the 11th of October 1865.

A writ of *certiorari* was also issued, to bring up from the

County Court the depositions and answers of Munn in his examination before Parke, and all summonses, orders, and other proceedings touching the same or the commitment of Munn. The writ was also returned, and both writs and the returns thereto were read and filed.

Christopher Robinson, Q.C., moved for the prisoner's discharge upon the papers returned, and upon affidavits. Munn swore that on his examination he stated to Mr. Parke that he had been served with the order for examination at the railway station, when about to start for Bothwell; that he had gone to Bothwell and thence to Enniskillen (in the County of Lambton), where he then resided; that any books, papers, etc., which he had were at his (Munn's) father's at Adelaide; that before his examination by Mr. Parke he had no opportunity of searching at his father's; that on hearing his answers as taken down by Mr. Parke he complained that they were not correctly taken down, but Mr. Parke would not alter them, whereupon he (Munn) declined to sign them; that on the 5th of September he was served with a summons to attend before the judge at London, to show cause why he should not be committed to the common gaol of the County of Middlesex for not producing his books and papers, and because his answers were equivocal, and evasive, and unsatisfactory, and that he did not sign his answers; that the summons (as he believes) was enlarged to the 9th, and then to the 26th of September; that on the last-mentioned day no one attended for the plaintiff, nor was the summons then enlarged, but on the 27th of September the plaintiff procured an indorsement to be made thereon, purporting to enlarge the said summons until the 11th of October 1865.

On the 11th of September 1865 the judge made an order for Munn to appear before him at the City of London on the 11th of October, to be further examined touching his estate and effects, and to produce his books and papers. A copy of this was served upon Munn, and he swore that he lost it, and that on the 11th of October he went to London, and told his attorney that he had been served with

and had lost a paper which appeared to him to require attendance on that day; that the attorney thought it was only a summons, which would be followed by an order, to which, when served, he (Munn) should attend; and that he (Munn) did not, until he was arrested, ascertain that the summons made absolute (*i.e.* on which an order was made) was the one dated on the 4th of September, and not the one dated on the 11th of September. Munn swore he was arrested on the 30th of October, and that he caused an application to be made to the judge to rescind the order on which he was committed, on the ground that the summons called on him to show cause why he should not be committed to the gaol of the County of Middlesex, and the order was to commit him to Lambton, but the judge refused unless he (Munn) would undertake not to bring any action in respect of the matters aforesaid; that since the 20th of October 1864 he (Munn) had resided in the County of Lambton, and not in the County of Middlesex.

An affidavit was made by Munn's attorney, confirming his statement as to what took place before Mr. Parke, and as to the enlargement of the summons of the 4th of September. It also stated that he (the deponent) was informed by the plaintiff after the issuing of this summons that the judge had determined that Munn should be again examined, and that after this information he did not attend upon the summons of the 4th upon the 26th of September, to which day it was (in fact) enlarged; that he believed the summons lapsed, as on the 26th of September there were no sittings at chambers, but on the next day, as appeared by the indorsement on the original summons, it was indorsed, "Enlarged until Wednesday the 11th of October 1865. Dated the 27th of September 1865," and signed by the judge.

In re Hawkins, 9 U. C. L. J. 298; *In re* Bigger, 10 U. C. L. J. 229; *Baird v. Story*, 23 U. C. R. 627; *Regina v. Munro*, 24 U. C. R. 53; *Regina v. Eggington*, 2 E. & B. 717; *Ex parte* Hill, 3 C. & P. 228; were referred to in support of the application.

M. C. Cameron, Q.C., showed cause. He filed an

affidavit made by the plaintiff's attorney, stating that on the 9th of November 1865 he was served with a summons issued by the judge of the County Court, calling on him to show cause why the order of the 11th of October, and all proceedings thereunder, should not be set aside, and Munn discharged from custody, because—1. The summons on which the order was made was lapsed before the making of the order. 2. The summons called on Munn to show cause why he should not be committed to the gaol of Middlesex, and the order directed his committal to the gaol of Lambton. 3. That after hearing the parties on that summons the judge did, on the 11th of September, order that Munn should be further examined before him, and did notwithstanding, on a subsequent day, and in Munn's absence, make a further order for Munn's committal. This affidavit also set out that on the 10th of November the judge made a further order that the order of the 11th of October, "so far as relates to *the commitment of the said Robert Munn, be rescinded*," and that Munn be discharged out of custody, "and that no action shall be brought by the said Robert Munn against the plaintiff in this cause, or any other person, for false imprisonment or trespass," which order had not been taken out by the defendant's attorney, and was still in force. And that the judge informed the deponent that the only reason for rescinding the commitment was because there might have been some mistake or misunderstanding on the part of Munn and his attorney, and that he (the judge) did so in order that Munn might be examined again, or explain his answers.

DRAPER, C.J., delivered the judgment of the court.

Looking at the return alone, the sole question is, whether the order of committal is on the face of it a valid and sufficient authority for Munn's detention. No doubt has been suggested as to the power of the judge to make such an order, nor that the commitment is intrinsically defective.

In regard to the matters brought before us by the return to the *certiorari* and the affidavits, the same objections which

were taken in the summons of the 9th of November were, with some others, renewed now.

As to the first objection, no party seems to have attended on the 26th of September, and on the next day it was enlarged until the 11th of October, of which enlargement it does not appear the defendant had notice.

The second objection might have been of some avail if raised on the return of the summons, but is of no importance on this application. And I do not think that the order of the 11th of September was an abandonment of the summons of the 4th; and if the defendant had obeyed that order, he would have had also the opportunity of objecting to the enlargement of the other summons, which, if he had satisfied the judge on his examination then, might have been dropped. The loss of the copy served of that order, and the mistake of its contents, were no fault of the plaintiff, and the non-attendance, because it was supposed to be a summons and not an order, was a neglect on the defendant's part, which had much to do with the subsequent difficulty.

But neither party have pressed the order of the 10th of November as material to be considered. The plaintiff's counsel adverted to its existence at the close of the argument. The defendant seems to treat it as nugatory, because he did not take it out and serve it. It is not shown at whose instance it was drawn up and the signature of the judge obtained to it. It is returned to this court as an existing order in the cause, and the learned judge certifies on the back of it that "this order was refused by the attorneys for Robert Munn."

Excepting the words, "that no action be brought," etc., it contains substantially what the defendant now asks for. In effect, if the order is really an existing proceeding in the cause, this *habeas corpus* operates as an appeal from it, because the defendant assumes that the words "no action," etc., create a condition, from which he desires to be relieved. Perhaps these words may be construed as creating a condition; possibly they form an entirely independent order, as unconnected with the rescinding the committal, and are *ultra vires* to bind the defendant against his will. But, however

that may be, the order is in fact made and signed, and is, by the judge at least, treated as part of the proceedings founded on a summons granted on the defendant's application.

We certainly think that the defendant is not bound by it without some act of concurrence. A party may abstain taking out a rule which is granted to him, and if he does so, it is as if it had not been granted, and no other party who did nothing to procure it, and was not served with it, could be affected by it.

We are of opinion the return to the writ taken *per se* is sufficient. As to the proceedings antecedent to and connected with the order to commit, the learned judge of the County Court evidently has arrived at the conclusion that they do not sustain it, or he would not have granted and signed an order to rescind it. We think there were irregularities in the proceedings which justify his acting in the cause. If we felt clear that the rescinding order was effectual, then there would be no authority for detaining Munn in custody, whatever there might be to commit him. But for the supposed condition it would be effectual, and the defendant, instead of refusing it, would have been discharged under it, and this application could not be made.

But the defendant has by this proceeding confirmed his attorney's refusal of that order, and virtually insists that the order of committal is *illegal and void*. We have not been able to bring ourselves to that conclusion, or to treat the defendant as having been as careful and attentive to the proceedings as he ought to have been.

It does not appear that he attended on the 26th of September; his attorney certainly did not. It seems, though we do not find it positively stated, that the learned judge did not sit in chambers on that day, and it is not unreasonable to suppose that being told no one had attended on the 26th, he may have thought it right to all parties to enlarge it to the same day on which he had ordered Munn to attend for examination. I have known cases in the superior courts, on a summons to compute, for example, or for an order for a defendant to be examined, when it was not received back in

time to be moved on the day it was returnable, that the order was made on the following day, it being shown that no one attended to oppose on the other side; and we may, we think, assume the learned judge to have acted in enlarging the summons on that ground. We are not by any means satisfied that this is a sufficient reason for treating Munn as entitled of right to be discharged; and while unable to say we have no doubt whatever, we certainly are more led to the conclusion that the return, when all the facts are considered, ought to be upheld.

We cannot shut our eyes to the inconvenience, if not danger, of making the writ of *habeas corpus* a mere method of appealing from the decision of other tribunals on points more of practice than affecting substantial merit; nor can we altogether overlook the fact that Munn might have been at liberty a month ago, but for his anxiety to bring an action or actions for this imprisonment.

On the whole we think he should be remanded.

MILLER v. THE CORPORATION OF THE TOWNSHIP OF NORTH FREDERICKSBURGH.

C.S. U.C. ch. 54, sec. 337—Limitation of actions.

The Municipal Act, sec. 337, provides that actions against a municipal corporation for not repairing highways must be brought "within three months after the damages have been sustained."

The plaintiff's mare fell through a bridge, and died four months after from the injuries received: *Held*, that the statute began to run from the occurrence of the accident, not from the death.

APPEAL from the County Court of Lennox and Addington.

This action was brought on the 6th of May 1865 against the Municipality of North Fredericksburgh for the loss of the plaintiff's mare, which fell through a hole in a bridge on the Mohawk Bay Road on the 27th of November 1864, and died on the 23rd of March 1865 from the injuries received.

It was objected at the trial that the action was not brought within three months after the damages had been

sustained, according to section 337 of the Municipal Act, Con. Stat. U. C. ch. 54.

The learned judge held at the trial, and afterwards in term, that the three months began to run from the death of the mare, and not from the occurrence of the injury, and that her value was to be considered at the time of her death, horses having risen considerably in market value in the interval; and a rule *nisi* obtained to enter a nonsuit was discharged.

On these points the defendants appealed.

Moss, for the appellants, cited *Patterson v. The Great Western R. W. Co.*, 8 C. P. 89; *Turner v. The Corporation of Brantford*, 13 C. P. 109; *Snure v. The Great Western R. W. Co.*, 13 U. C. R. 376; *Moison v. The Great Western R. W. Co.*, 14 U. C. R. 109; *Vanhorn v. The Grand Trunk R. W. Co.*, 18 U. C. R. 356; *Brown v. Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202; *Whitehouse v. Fellowes*, 10 C. B. N. S. 784; Consol. Stat. C. ch. 66, sec. 83.

Gwynne, Q.C., contra.—The statute expressly makes defendants responsible for “all damages” sustained, and this is not carried into effect, if the action must be brought before the whole extent of the injury is known or has been suffered, as the appellants contend for. He cited *Roberts v. Read*, 16 East, 215; *Gillon v. Boddington, Ry. & Moo.* 161, S. C. 1 C. & P. 541; *Mayne on Damages*, 37.

HAGARTY, J., delivered the judgment of the court.

The words of the section are, “And the corporation shall be civilly responsible for all damages sustained by any person by reason of such default” (*i.e.* default in repairing), “but the action must be brought within three months after the damages have been sustained.”

The case of *Bonomi v. Backhouse* (E. B. & E. 622), relied on in the court below, established, in the words of the judgment of the Exchequer Chamber, that “no cause of action accrued from the mere excavation by the defendant in his own land, so long as it caused no damage to the plaintiff; and that the cause of action did accrue when the actual

damage first occurred" (E. B. & E. 659; and in the House of Lords, 1 B. & S. Am. Ed. 970, 9 H. L. Cas. 503).

In such a case we think the same rule would apply, whether the words creating the limitation were "from the accruing of the action," or, as in the case in appeal, "after the damages have been sustained." No wrongful act was in fact done till the damage accrued.

In the case before us defendants were answerable in damages to parties injured by their neglect to perform a statutable duty—namely, the keeping in repair of a bridge. No cause of action vests in any person against them for damages till an injury is sustained by their default. As soon as the mare was injured by falling or stepping into the hole in the bridge, the plaintiff's cause of action was complete. His damages were then sustained, in the words of the statute. The subsequent death of his mare was merely an additional evidence of the extent of his damages, and in our judgment cannot be held "a sustaining of damage" in the view of the statute.

Mr. Gwynne, in his ingenious argument, admitted that an action might be brought immediately after the accident, and that a recovery would be a bar to all future actions, even if it were erroneously thought that the mare would completely recover, and her subsequent death would give no additional claim.

In a case like this there is no question of what is called "continuing damage," as in the case of a nuisance, or the diversion of a stream or penning back of water, which from day to day is occasioning injury, and for which a fresh action may be daily instituted. Here all connection between the cause and the injury, all injurious action by defendants against the plaintiff, ceases from the happening of the accident. The plaintiff has sustained the whole of his damages; his mare is fatally injured. The damage is not the less because he does not know its full extent, or because (if he sue before her death) his witnesses may not speak with certainty as to the fatal character of the injury, or because other witnesses for defendants may declare that she will recover, and regain all her former vigour and usefulness.

It seems to us a misconception to speak of the death of the mare at an interval of three, six, or nine months after the accident as the "sustaining of the damage" mentioned in the Act.

It is quite true that requiring the action to be brought within three months from the cause of action may create more difficulty in duly proving the proper measure of damage. This cannot be avoided. It is a difficulty occurring in numerous cases; for assault and battery, injuries (not fatal) in public conveyances, etc. Contradictory testimony is frequently adduced as to the temporary or permanent character of the alleged injury; but the damage, be it small or great, has been sustained by the plaintiff as against the defendants by the occurrence of the unlawful act of commission or omission. However difficult to prove, it has been sustained; the effects of the injury may be developing themselves very slowly, and perhaps obscurely.

If the view of the court below be law, it will deprive municipalities of the special protection given them by the statute, and extend the period of limitation indefinitely until three months after, not the default causing the injury, but the ultimate development of its effects by the death of the person or animal the subject of such injury.

We think the appeal must be allowed, and the rule to enter a nonsuit, on the leave reserved, be made absolute.

It is not necessary to discuss the question of value.

Appeal allowed.

CULLY v. WINTER.

Covenant—Pleading.

Declaration on a covenant to pay \$1400 on a day named if the defendant did not make a deed in fee simple, clear of all encumbrances, of certain land specified, to the plaintiff, his heirs and assigns. *Breach*, that defendant did not make a deed in fee simple, clear of all encumbrances, of the said land to the plaintiff, his heirs and assigns, nor did he pay the \$1400. *Demurrer*, that the breach is uncertain, as it might mean either that defendant made no deed, or not one free from encumbrances, in which case the encumbrances should be stated.

Held, that the breach was sufficient.

DECLARATION.—For that the defendant, by deed bearing

date the 18th of March 1864, covenanted with the plaintiff that the defendant would pay to the plaintiff the sum of \$1400 on the eighteenth day of March 1865 if the defendant did not make a deed in fee simple, clear of all encumbrances, of the east half of lot number twenty-four, in the tenth concession of the township of Brooke, in the county of Lambton, unto the plaintiff, his heirs and assigns. And the plaintiff says that the defendant did not make a deed in fee simple, clear of all encumbrances, of the east half of lot number twenty-four, in the tenth concession of the township of Brooke, in the County of Lambton, unto the plaintiff, his heirs and assigns, nor did the defendant pay the said sum of \$1400, or any part thereof, to the plaintiff, and the same remains wholly unpaid, contrary to the defendant's said covenant.

Demurrer, on the grounds—1. That there is no proper breach laid, as it is not shown nor stated whether the breach intended is that the defendant did not make a deed at all, or did not make a deed clear of all encumbrances; and if the latter, then the breach should show the encumbrances. 2. That it is not alleged that the defendant did not make such deed as in the first count of the declaration mentioned before the said eighteenth day of March therein mentioned. 3. That there is no allegation that the plaintiff demanded of or requested the defendant to make any such deed as in the first count mentioned, or that a reasonable time had elapsed for making such deed.

J. H. Cameron, Q.C., for the demurrer, cited Com. Dig. "Pleader," C. 44; Rawle on Covenants for Title, 125; *Wilson v. Rorke*, 2 U. C. R. 437; *Sawyer v. Killigrew*, 4 Mod. 44.

C. Robinson, Q.C., contra, cited *Legh v. Lillie*, 6 H. & N. 165; Bullen & Leake Prec. 189.

DRAPER, C.J., delivered the judgment of the court.

The covenant must be construed as if it had expressed that the land was to be conveyed free of all encumbrances, and possibly might entitle the purchaser to a general cove-

nant against encumbrances. The action is, however, not brought upon a covenant that the land was free from encumbrances, but that the defendant would convey it free from encumbrances; and the breach is, in the words of the covenant, that he has not made a deed free from encumbrances, thereby, as we construe it, negating the making a deed at all.

The defendant, to answer this part of the breach, must necessarily plead performance, averring that he did make a deed, etc.; and then, if the plaintiff relies on the land being encumbered, he must show how.

For, as the covenant is stated, it may be deemed an undertaking to pay \$1400 unless he makes a deed, etc., treating the latter act as a defeasance of the engagement to pay, and therefore making it incumbent on defendant to discharge himself of the payment by showing that he has fulfilled the alternative obligation.

As to the second objection, it might have required an answer upon special demurrer; but an averment that the defendant has not paid the money, and that it remains wholly unpaid, is enough on general demurrer.

The third objection was given up.

Judgment for plaintiff on demurrer.

THE GREAT WESTERN RAILWAY COMPANY v. THE GRAND
TRUNK RAILWAY COMPANY OF CANADA.

R. W. Cos.—Agreement under Consol. Stat. C. ch. 66, sec. 131—Consent of shareholders—Validity of agreements to charge same rates, etc.

Plaintiffs sued on an agreement entered into by them with defendants, providing for the same rates on through traffic to be charged by each, and a division of the net profits therefrom. Defendants pleaded that the agreement was never submitted to the shareholders of either company, nor did two-thirds of the shareholders, either in person or by proxy, assent thereto, as required by "*The Railway Act.*" The plaintiffs replied, on equitable grounds, that defendants should not be allowed to make this objection, because after the agreement had been made and its provisions entered upon, its existence and working was communicated in written reports by the directors of each company to their shareholders, and announced to them at a regular meeting of shareholders, who then had full notice thereof, and did not dissent therefrom, but ratified and approved of the same, and permitted it to be continued and acted on. And that defendants' stockholders, at a regular meeting, approved of the sums found as balances struck in favour of the plaintiffs on the monthly settlements provided for in such agreement, which sums are now sued for.

Held, such an agreement being only authorized by the statute "subject to the consent of two-thirds of the stockholders, voting in person or by proxy," that the replication afforded no answer to the plea.

The rule of law and equity in such a case is the same.

Held, also, that in declaring on such an agreement the general averment of the performance of all conditions precedent was sufficient, without alleging specially that the statutable consent had been obtained.

The contract declared on being for an assimilation of rates, and a division of the net profits on certain classes of traffic, between certain points, was objected to as illegal and contrary to public policy. The question having given rise to great difference of opinion in England, the Court followed the latest decision—*Hare v. London and North-Western R. W. Co.*, 30 L. J. 517—and upheld the contract.

THE DECLARATION contained common counts in *indebitatus assumpsit*; and a count on an agreement under the respective corporate seals of the two companies, respecting certain traffic and passenger arrangements, and claimed a large sum from defendants as due to the plaintiffs on the basis of the agreement, according to the monthly accounts rendered by them in pursuance of said agreement, averring "that all conditions were performed and fulfilled, and all things happened, and were done, and all times elapsed necessary to entitle the plaintiffs to a performance of the said agreement."

The defendants pleaded to the common counts never indebted, and that the moneys sought to be recovered accrued only on an agreement, set out in full, and which was

illegal, inasmuch as it had never been submitted to the shareholders of either company, nor consented to by them, as required by statute.

On a previous demurrer to this plea it was sustained, and judgment given for defendants in this court. See *ante*, page 107, where the agreement is sufficiently set out for the purposes of this report.

To the second count, after *non est factum*, defendants (in their fourth plea) pleaded, after setting out the whole agreement, that it was made after the passing of Consol. Stat. C. ch. 66: that it was not at any time before the commencement of this suit submitted to the stockholders of the Great Western Railway, nor did two-thirds of the shareholders of the said the Great Western Railway Company, voting in person or proxy, ever consent to the said agreement:

That the said agreement never was, before the commencement of this suit nor since, submitted to the proprietors or the shareholders of the Grand Trunk Railway Company of Canada, the defendants, for their approval, and that the said agreement never received the consent of the votes of two-thirds of the proprietors, or of the stockholders of the Grand Trunk Railway Company of Canada (the defendants), voting in person or by proxy at any general meeting or other meeting of said proprietors, or of said stockholders, and that therefore the said agreement in the second count mentioned is illegal and void. And the defendants further say that the agreement in this count mentioned is the same agreement mentioned in this plea.

Defendants also pleaded, in their fifth plea, that the said agreement in the second count mentioned is the same agreement set out in the second plea, and was made after the passing of the statute before mentioned: "that at the time the said agreement was so made as aforesaid the Northern Railway Company of Canada owned or worked a line of railway in this province, which touched the defendants' railway at Toronto, and the Buffalo and Lake Huron Railway Company owned and worked a line of railway which crossed the lines of the plaintiffs' and defendants' railway

respectively, and the said two last-mentioned companies were common carriers of goods and passengers in this province, and were at and after the time of making of said agreement employed in the carriage and conveyance of goods and passengers under their Acts of incorporation as such common carriers as aforesaid :

That at the time the said agreement was made the same was intended and designed to give, and the said agreement does give, the plaintiffs in the interchange of traffic, that is, of goods and passengers passing to and from the plaintiffs' to the defendants' railway, an undue advantage and preference over the said Northern Railway Company and the said Buffalo and Lake Huron Company, contrary to the statute aforesaid ; and that the said agreement provided for the like preference and undue advantage to the defendants in relation to traffic passing to and from the plaintiffs' railway, and that the said agreement provides for and binds the plaintiffs and the defendants respectively in the receiving and interchange of traffic, and in the carrying of goods, wares, and merchandise, and passengers, giving each to the other an undue preference over all other persons and parties using or desiring to interchange traffic with the said companies respectively ; and that the said covenants contained in the agreement upon which the breaches in the second count are assigned were and are, in this and in other respects, shown upon the face of said agreement, contrary to public policy and illegal and void."

Defendants also demurred to the second count of the declaration, because it was not alleged that the said agreement was ever submitted to the stockholders of the plaintiffs, or consented to by two-thirds of the said stockholders, voting in person or by proxy ; nor that it ever was submitted or consented to by the votes of two-thirds of the proprietors or of the stockholders of the defendants, voting in person or by proxy, at any general meeting or other meeting of the same : that it is not alleged that the several requirements of the statute in that behalf, and which were and are conditions precedent to the said agreement being operative and in force, were ever complied with by either of the plaintiffs or the

defendants, and that ever any rights accrued to either party thereunder: that the said agreement is on the face of it illegal and void, as being contrary to public policy, and also on the ground that the said agreement, as set out in said second count, is and was contrary to law, and beyond the power of said plaintiffs and also of the defendants: that the agreement stipulates for a division of the net profits of said companies in said count mentioned, which is contrary to law.

The plaintiffs replied, on equitable grounds, to the fourth plea (being the second plea of the defendants to the second count), that the defendants ought not to be admitted to say that the said agreement in the said fourth plea mentioned was not at any time before the commencement of this suit submitted to the stockholders of the Great Western Railway, nor did two-thirds of the shareholders of the said Great Western Railway Company, voting in person or by proxy, ever consent to the said agreement; nor that the said agreement never was, before the commencement of this suit, nor since, submitted to the proprietors or the shareholders of the Grand Trunk Railway Company of Canada, the defendants, for their approval; and that the said agreement never received the consent of the votes of two-thirds of the proprietors or of the stockholders of the Grand Trunk Railway Company of Canada (the defendants), voting in person or by proxy, at any general meeting or other meeting of the said proprietors or of said stockholders; because the plaintiffs say that after making the said agreement in the said plea mentioned, and after the provisions therein contained had been entered upon and carried out by the plaintiffs and defendants, the existence and working of the said agreement between them was communicated in written reports from the directors of the plaintiffs to the shareholders and stockholders of the Great Western Railway Company, and announced to the said shareholders and stockholders, at a regular meeting of the said shareholders and stockholders, who thereupon had full notice of the said agreement, and did not then, or at any time thereafter, dissent to the same, but, on the contrary, ratified, confirmed, and approved of the same, and also that working under the provisions thereof should be continued.

And because the plaintiffs further say, that after the making and sealing of the said agreement in the said plea mentioned, and after the provisions therein contained had been entered upon by the plaintiffs and the defendants, the existence and working of the said agreement between them was communicated in written reports from the directors of defendants to the proprietors and stockholders of the Grand Trunk Railway Company, and announced to the said proprietors and stockholders at a regular meeting of the proprietors and stockholders of the Grand Trunk Railway Company, who thereupon had full notice of the said agreement, and did not then or any time thereafter dissent from the same, but, on the contrary, permitted and allowed the same to be continued and acted on after the existence of said agreement was notified to the proprietors and stockholders aforesaid. And the plaintiffs also say that the said proprietors and stockholders of the Grand Trunk Railway Company, at a regular meeting of the proprietors and stockholders, approved of the sums found as balances which had been struck in favour of the plaintiffs, between the plaintiffs and defendants, in pursuance of the monthly settlements in the said agreement specified, which said sums are sought to be recovered by the plaintiffs, in and by the breaches of covenant by the plaintiffs in the said second count charged; wherefore the plaintiffs say it would be inequitable to allow the defendants to say that the said agreement was illegal and void, by reason of a direct vote of the proprietors of the Grand Trunk Railway Company, or of the shareholders of the Great Western Railway Company, not having been taken thereon.

The plaintiffs also demurred to the fifth plea.

The defendants demurred to the plaintiffs' equitable replication to the fourth plea, on the grounds—

1. That the said replication is no answer, either at law or in equity, to the said plea.

2. That there is no matter alleged in said equitable replication which would in equity entitle the plaintiffs to an absolute and unconditional injunction against the defendants, in respect to the matter to which it is pleaded.

3. That the said replication does not show that the pro-

prietors and stockholders of the defendants ever had notice of the contents of the said agreement, or of the clauses or provisions thereof, or of the provisions or substances of the said agreement, so as to be able to form an opinion or judgment thereon; nor does it allege that they ever were aware of the contents of the said agreement, or the particulars of its provisions, or that any reports or accounts ever submitted ever showed the particulars or provisions of the said agreement.

4. That the said replication admits that the said agreement never was submitted to the shareholders, stockholders, or proprietors, of either the defendants or the plaintiffs, as required by statute in that behalf; or that the said agreement, directly or indirectly, ever was assented to by two-thirds of the stockholders of the plaintiffs, voting in person or by proxy, or two-thirds of the stockholders or proprietors of the defendants, voting in person or by proxy, at any general meeting.

5. That the said replication shows no adoption of the said agreement, under the Act of Parliament in that behalf; nor does it show any assent thereto by the defendants, which at law or in equity would amount to a compliance with the requirements of the said Acts relating to such agreement.

6. That the plaintiffs, in and by the said replication, admit and show that they cannot at law maintain an action upon the said agreement, and they attempt to set up a claim thereon in equity; that they, in an action at law, cannot do this, inasmuch as, unless the plaintiffs were entitled to maintain this action on the said agreement at law, they should have proceeded in equity; and further, on the ground that in fact the said replication is a departure from the cause of action set up in the second count of the declaration, and attempts to set up a claim in equity, and admits the plaintiffs, on the agreement in the second count mentioned, cannot maintain an action at law.

M. C. Cameron, Q.C., and *Irving, Q.C.*, cited as to the averment of performance of conditions precedent, *Bullen & Leake's Prec.* 2nd ed. 125, 483; *Steph. Plg.* 270, 287, 288;

Hotham *v.* East India Co., 1 T. R. 645, 646, per Ashurst, J.; Mayor of Salford *v.* Ackers, 16 M. & W. 85.

As to traffic agreements generally, Hodges on Railways, 3rd ed. 98, 663; Shrewsbury and Birmingham, etc., R. W. Co. *v.* London and North-Western R. W. Co., 17 Q. B. 652, 6 H. L. Cas. 113; Hare *v.* London and North-Western R. W. Co., 2 Johns. & Hem. 80, 7 Jur. N. S. 1145, 30 L. J. Chy. 817.

As to ratification and acquiescence by shareholders, Royal British Bank *v.* Turquand, 5 E. & B. 248, 6 E. & B. 327; Bargate *v.* Shortridge, 5 H. L. Cas. 297, 25 L. T. Rep. 204; *Re* British Provident Life and Fire Assurance Co., *Ex parte* Grady, 8 L. T. Rep. N. S. 98, 9 Jur. N. S. 631; Lane's Case, 3 N. R. 50, 33 L. J. Chy. 84, 10 Jur. N. S. 25, 1 De G. & Sm. 50; Ormes *v.* Beadel, 30 L. J. Chy. 1, 6 Jur. N. S. 1103, 3 L. T. Rep. N. S. 344; *Re* Era Assurance Co., Williams' Case, 1 Hem. & M. 672, 7 L. T. Rep. N. S. 595; Lindley on Partnership, 201, 205, 210, 212; Tupper *v.* Foulkes, 9 C. B. N. S. 797; Hartley *v.* Wheaton, 11 A. & E. 934; Bankhart *v.* Houghton, 27 Beav. 425; Williams *v.* Earl of Jersey, 1 Cr. & Ph. 91; Gregory *v.* Patchett, 11 L. T. Rep. N. S. 357; Reuter *v.* Electric Telegraph Co., 6 E. & B. 341; Ridley *v.* Plymouth Grinding and Baking Co., 2 Ex. 714, 717, 719; National Exchange Co. of Glasgow *v.* Drew, 2 Macq. H. L. Cas. 103; *Re* Royal British Bank, Brockwell's Case, 4 Drew, 205.

J. H. Cameron, Q.C., John Bell with him, cited Hickey *v.* The Anchor Assurance Co., 18 U. C. R. 433; Jacobs *v.* The Equitable Insurance Co., 18 U. C. R. 14; *Re* Jones and the Eastern Counties R. W. Co., 3 C. B. N. S. 718; Directors of the Shrewsbury and Birmingham R. W. Co. *v.* Directors of the N. W. R. W. Co., 6 H. L. Cas. 135; London, Brighton, and South Coast R. W. Co. *v.* London and S. W. R. W. Co., 4 De G. & J. 362; Charlton *v.* The Newcastle and Carlisle R. W. Co., etc., 5 Jur. N. S. 1096.

HAGARTY, J., delivered the judgment of the court.

It stands admitted on these pleadings that the agreement

never did obtain the formal statutable assent of two-thirds of the shareholders.

We have now to consider whether the equitable replication displaces that defence; in other words, would the facts there stated, if set forth in a bill in equity, entitle the plaintiffs to an unconditional perpetual injunction against defendants setting up such a defence.

The alleged equity is, that the existence of the agreement, after it had been in actual operation, was made known to the shareholders in written reports, and announced at a regular meeting, and that they had full notice of it, and neither then nor afterwards dissented, but knowingly permitted it to be continued and acted on, and approved of sums found due as balances.

This raises a very grave question, how far such knowledge and abstinence from expressed dissent or interference on behalf of the shareholders generally, are to be held equivalent to the active consent of two-thirds of the stockholders voting in person or by proxy.

The object of the legislature was apparently to protect the body of shareholders from being bound by agreements of a specified character, unless two-thirds of the whole body expressly sanction them. It does not provide for a two-thirds vote at any particular meeting, but of an absolute two-thirds of the whole constituent body voting in person or by proxy.

We must bear this in mind in considering what acts on the part of such a body may be held in a court either of law or equity as an equivalent for the admitted absence of this express protection.

We do not read the replication as alleging that the agreement was communicated to or actually acquiesced in by two-thirds of the shareholders, but merely that it was communicated to the shareholders at a regular meeting of stockholders who (*i.e.* those present at such meeting) had notice and expressed no dissent, etc. At least there is no positive averment of notice to or action by any number of shareholders amounting to two-thirds of the whole body, as would

seem to be the important fact to be alleged, if true, where it is sought to excuse a statutable duty.

We are to consider the sufficiency of the proposed equivalent.

It is not very clear why there should be any different rule of law and equity on this point.

In a case of *Bargate v. Shortridge* (5 H. L. Cas. 297) the deed of settlement provided that no transfer of stock should be permitted except on notice to the directors, and on consent thereto of a board of directors, who should certify such consent. A shareholder made a transfer and properly notified the directors, and he received back a consent signed by three directors. The transferees' names were entered in the transfer-book, and the transferors' names erased from the stock list, and the transferees afterwards received regular notices of meetings. The directors sought to impeach the transfer because notice had never been submitted to a board of directors, but the consent was merely signed by the manager and two other directors, not *as a board*; and this method of transacting their business had existed since the company was formed.

Lord St. Leonards said: "The question is whether a long course of dealing by a company, contrary, not to the real interests of the company or the *bonâ fides* of the transactions, but contrary to some of the terms of the deed under which the company was formed, shall or shall not be held to disentitle such company to object to particular rights acquired by that course of dealing, as acquired in disregard of the provisions of the company's deed of settlement. I entirely agree with my noble and learned friend" (Lord Cranworth) "that the question as to the effect of this disregard ought to be considered in the same manner in equity as at law. There is no equity that I am aware of arising out of these transactions which ought not to be applied as a rule of law; and the question therefore simply amounts to this: Have the directors or the shareholders by their conduct precluded themselves from objecting to the informality of which they themselves have been guilty. . . . I desire it to be understood that, as far as my opinion goes, there is not any equity

arising out of the dealings between the parties which would constitute a right in equity as contradistinguished from the operation and efficiency of those very same proceedings at law. . . . I believe the distinction to be correct, that if the directors do acts in violation of their deed, in a manner in which they have no authority, in that case it is not a question of mere form, for that form is substance. The thing is not within their power, it is *ultra vires*, and those acts are altogether null and void. But in a case like this the act to be performed is within the power of the directors, where it is their duty to do it, and if they neglect to do it, and by their neglect damage accrues to third parties, a court of law, as I apprehend, or a court of equity, will not allow the company to take advantage of such neglect."

From this language it may be gathered that in such a case the rule of law and equity is the same, and it further pointedly distinguishes between the non-observance of prescribed forms in the doing of an act within the power of the directors of a company, and the omission of something not within their power as directors—of something which requires other action than that of the managing or governing body of the company.

The case before us is that the directors made a contract which, to acquire validity, must be assented to by a two-thirds vote of the whole constituent body represented by them. No action of their own as directors could supply this assent. It rested with others outside their board-room. The case, therefore, differs in substance from that just cited.

Then as to the shareholders, is knowledge or acquiescence on their parts sufficiently shown to bind the company? A shareholder learns from perusing a report that such an agreement has been made; he is also aware that by the statute there must be the consent of two-thirds. He naturally looks for a notice of the time for expressing such assent; aware of all this, he does nothing, attends no meeting, and has no further cognizance of the matter. It is not easy to see how any equity is created against him. He merely assumes that his directors will obey the law.

As to those shareholders who at a meeting or otherwise

are informed of this agreement, make no objection, and, in the words of this replication, "permit and allow the same to be continued and acted on, . . . and approved of the sums found as balances struck in favour of the plaintiffs," a wide field of discussion might readily be opened. It might be necessary to see whether such acts, or rather such passive conduct, will raise the required equity, and whether it might not be necessary to go much further, and aver that defendants had acted on the agreement in carrying out its provisions, obtaining from the plaintiffs advantages or causing them to forego advantages or incur loss on the faith of the agreement, so as to make it unjust to permit its repudiation.

The only matter suggested is, that the shareholders at a meeting approved of certain balances struck in favour of the plaintiffs, a statement capable of suggesting a state of things either wholly working against the interests of the defendants, and causing a balance against them, or at all events disclosing no loss sustained or injury done by or to the plaintiffs.

But in our view of the law such a discussion is unnecessary. We think the matters in the replications in no way displace the defence under the statute, and that nothing is stated equivalent to the two-thirds consent there required.

We think a mere announcement by the directors that such an agreement had been entered into, even if it reached the ear of every shareholder (which is certainly not expressly if at all averred), would not *of itself* amount to the consent mentioned in the statute.

The subsequent alleged absence of dissent and other alleged acts of approval only refer to the shareholders at some meeting spoken of, which may have consisted of a tenth or twentieth part of the whole body.

We think the facts pleaded in the replication if set forth in a bill would not entitle the plaintiffs to an injunction against setting up the defence sought to be displaced. We think the plaintiffs must have failed on such a statement.

It seems to us we should be destroying the wholesome protection given to the shareholders by their charter of incorporation were we to hold this replication sufficient.

In this view we do not think it necessary, for the mere purpose of the costs of this third plea to the second count, to enter into the wide discussion of the alleged illegality of the agreement as contrary to public policy, etc. We hold on the record that it is inoperative without the statutable consent, and therefore the plaintiff's action fails.

We give judgment for the defendants, *pro formâ*, on the demurrer to the third plea to the second count. If the plaintiffs desire to appeal, the whole question will be open for discussion.

It remains to notice the demurrer to the second count of the declaration, although in the general result of our judgment it is only a question of costs.

The count sets out the agreement, and then avers that all conditions were "performed and fulfilled, and all things happened and were done," etc., "necessary to entitle the plaintiffs to a performance of said agreement."

Objection is taken that it should have been averred expressly that the statutable consent had been obtained, and the question as to the *primâ facie* illegality of the agreement is raised.

As to the first objection, we do not see why the general averment of performance should not be sufficient. The defendants can hardly seek to place the two-thirds consent on a higher ground than that of a condition precedent to the plaintiffs' right of recovery; and section 80 of our Common Law Procedure Act expressly sanctions the general form of averment, the advantages of the enactment being well explained in the notes to Bullen & Leake's Precedents, pp. 124, 125.

We do not think it falls within the rule requiring (as Lord Mansfield says) that "the exceptions contained in the enacting clause of a statute, which creates an offence and gives a penalty, must be negatived by the plaintiff in his declaration" (*Spieries v. Parker*, 1 T. R. 144).

The clause in the Railway Act declares that companies may make certain agreements with other companies, subject to the consent of two-thirds of their shareholders. Assuming this to be a condition precedent to the validity of the agree-

ment, the declaration seems sufficiently to aver that all such conditions were performed, leaving it for the defendants to specify what it is that they assert was not performed.

The argument from a statute creating a new offence is easily distinguishable. There the proviso, as it were, makes it cease to be an offence, or rather takes it out of the definition of the offence.

We are in favour of the plaintiffs on this point.

As to the objection of *prima facie* illegality of this agreement stated in the count, the same question, but in a much larger form, arises on the plea which sets out the whole agreement. The count merely states a portion of the agreement, and some of the objections most strongly pressed in argument by the defendants apply to portions not stated in the declaration.

The remaining objections to the second count may be stated to be, substantially, that the contract there appearing, namely, an assimilation of rates between certain points, and an agreement for a division in certain proportions of the net profits of the two companies on certain classes of traffic between them, was illegal and opposed to public policy.

Were this a new question, we should probably hesitate long before giving an opinion in favour of its legality. We think we should follow the very elaborate judgment of *Wood, V.C.*, in the case cited of *Hare v. London and North-Western Railway Company* (30 L. J. Chy. 817). It is a most complete review of the whole question as to a division of the profits, and is a final affirmance of its legality. "It is unfortunate," he says, "to find such a prodigious difference of opinion, and that among the most eminent judges. I find the question has been before seven judges of the court of equity and four judges of a court of common law." See also the *Shrewsbury and Birmingham R. W. Co. v. London and North-Western R. W. Co.*, etc. (17 Q. B. 652).

We therefore, without further remark, adopt the decision in the latest case, and give judgment for the plaintiffs on demurrer to the second count.

Judgment for plaintiffs on demurrer to the second count. Judgment for defendants on demurrer to the replication to the fourth plea, being the second plea of defendants to the second count; and on demurrer to the fifth plea, being the third plea to the second count.

PETER AND MARY HICKS *v.* MATHIAS ROSS.

Seduction—C. S. U. C. ch. 77.

The mother of an illegitimate daughter cannot, under the Seduction Act, maintain an action for the seduction of such daughter while she was living with the defendant.

Remarks by *Draper, C.J.*, as to the effect of that statute in attaining its object.

DECLARATION.—For that the defendant, after the passing of Consol. Stat. U. C. ch. 77, and after the death of the father of the hereinafter-named Amanda Hicks, and after the intermarriage of the above-named plaintiff Mary Hicks with the above-named plaintiff Peter Hicks, and during the continuance of said marriage, and while the said Amanda Hicks was residing with the defendant herein, and before the commencement of this suit, debauched and carnally knew the said Amanda Hicks, who was then and has always been an unmarried female, being the daughter and servant of the said Mary Hicks: whereby the said Amanda Hicks became pregnant, and was delivered of a child; and the plaintiff Mary Hicks thereby lost the services of the said Amanda Hicks for a long time, and incurred expenses in nursing and taking care of said Amanda Hicks in and about the delivery of said child. And this action is brought by the plaintiff Mary Hicks as the mother of the said Amanda Hicks, under the said statute, and the plaintiff Peter Hicks, her now husband, is joined in this action for conformity.

Second Plea.—That the said alleged father of the said Amanda Hicks was not, during his lifetime, and at the time of the birth of the said Amanda Hicks, the husband of the said plaintiff Mary Hicks; and the said Amanda Hicks is not the legitimate daughter of the said plaintiff Mary Hicks,

and was not at the time when, etc., the servant of the said plaintiffs, or either of them.

To this plea the plaintiffs demurred.

Robert A. Harrison, for the demurrer, cited *Biggs v. Burnham*, 1 U. C. R. 106; *Smith v. Crooker*, 23 U. C. R. 84; *M'Intosh v. Tyhurst*, 23 U. C. R. 565; *S. C. 24 U. C. R. 443*; *Green v. Wright*, 24 U. C. R. 245; *Westacott v. Powell*, 2 Error & App. Rep. 525.

Diamond, contra.

DRAPER, C.J., delivered the judgment of the court.

This action is brought by Peter Hicks and Mary Hicks his wife. The declaration states that the husband is joined only for conformity.

The facts admitted by the demurrer are: That the defendant, after the death of the father of Amanda Hicks, and after the intermarriage of the plaintiffs, and during the continuance of that marriage, and while Amanda Hicks was living with defendant, and before the commencement of this suit, seduced her, the said Amanda then being an unmarried female, and being the daughter and (as the declaration states, but the plea denies) servant of the plaintiff Mary, whereby, etc., and the plaintiff Mary lost the services of the said Amanda; and the action is brought by the plaintiff Mary, and her husband is joined for conformity.

Plea.—That the father of Amanda Hicks was not the husband of the plaintiff Mary, and she is an illegitimate daughter of the plaintiff Mary, and was not, at the said time when (as the plea asserts), her servant.

The action is rested entirely on the Seduction Act, for the declaration expressly states that the girl Amanda was seduced by the defendant while she was living with the defendant, and therefore the action would not be maintainable at common law.

But for the plaintiff it is insisted that the action is maintainable, because sec. 1 of the statute enacts that "the father, or in case of his death the mother of any unmarried female who has been seduced, and for whose seduction the father or

mother could sustain an action in case such unmarried female were at the time dwelling under his or her protection, may maintain an action for the seduction, notwithstanding such unmarried female was, at the time of her seduction, serving or residing with another person, upon hire or otherwise."

The demurrer to the plea admits the illegitimacy of the girl Amanda, and, as a legal inference, denies that under the facts stated in the declaration she was the servant of the plaintiff Mary.

In *Biggs v. Burnham* (1 U. C. R. 106) *Robinson, C.J.*, says it is impossible to apply the 1st section of the Seduction Act to the case of the father of an illegitimate child. And, referring to the preamble of the statute, he remarks that the law "did, before the passing of this Act (as it was practically administered at least), profess to afford redress to the parents of legitimate children, but not to the parents of illegitimate children. To the latter it did not fail in some cases to give redress; it refused in *all* cases to allow them to sue for the seduction of their natural daughter, that is, to sue *as parents*." In that case the judgment was that the father of an illegitimate daughter could not maintain an action against her seducer under the statute.

The head-note to the case of *Muckleroy v. Burnham* (1 U. C. R. 361) is, though literally correct, very likely to lead to a false impression, that the mother of an illegitimate daughter may maintain such an action *under the statute* against the seducer, whereas, on reading the judgment, the decision is obviously this, that the mother in such a case can only maintain the action upon the principles of the common law, but that she so far is to be considered as *in loco parentis* that the damages may go beyond the mere loss of service, and include compensation for wounded feelings.

It would be an anomaly to create a distinction as to the legal rights of father and mother of an illegitimate daughter, who could never claim as heiress or next of kin to either parent, or to hold that under the statute the "father" of an illegitimate unmarried female is not entitled to the statutory remedy, and that the mother is.

We think the defendant should have judgment.

Speaking for myself only, I will add that I am not inclined to extend the operation of the Seduction Act by what may be deemed a large and liberal construction. My own observation as a judge has by no means led me to think that it has had a favourable influence on female morals. I think the law, treating its object to be the prevention and punishment of seduction, not very effectual in its present shape ; and that the hope or probable prospect of recovering large damages operates at least as injuriously in one direction as the fear of being subjected to their operation beneficially in the other.

Judgment for defendant, on demurrer.

THE PROVIDENT LIFE ASSURANCE AND INVESTMENT
COMPANY *v.* WILSON.

18 *Vict. ch. 211*—*Action for calls under—Omission by directors to appoint place of payment.*

The plaintiffs' Act of incorporation provided that stockholders should pay up their shares "by such instalments and at such times and places as the directors of the said corporation shall appoint." It provided also for the appointment of a managing director, "to whom shall be delegated the special management of the business of the society."

The directors passed a resolution, ordering a call, payable in two payments on days specified, and directing the secretary to notify the stockholders according to the Act. A notice, signed by the managing director "by order," was published, and a circular signed by him sent to each shareholder, in which the place of payment was mentioned ; but there was no meeting of directors between the passing of the resolution and the day named for payment.

In an action for this call it was objected at the trial that the directors had appointed no place of payment, the advertisement and circular being the act of the managing director only.

Held, reversing the judgment of the county court, that the objection was fatal, and a nonsuit was ordered.

APPEAL from the County Court of York and Peel.

This was an action against the defendant as owner of twenty shares in the plaintiffs' company for the balance due in respect of two calls of \$2 each upon each of said shares.

At the trial it was proved that the directors, on the 4th of November 1863, passed a resolution "that a call of \$4 per share on the unpaid stock of the company be made, and that the same be made payable in two payments of \$2 each,

to be paid severally on the 14th days of January and March next, and that the secretary proceed to notify the stockholders thereof according to the Act:" that in the *Globe* newspaper of the 9th of November 1863 a notice signed "By order, H. Rowsell, Managing Director," was inserted, stating, in substance, that by resolution of the board of directors, adopted on the 4th of November, a call of \$4 per share was ordered, payable at the office, 20 Toronto Street, in two instalments of \$2 each, on the 14th of January and the 14th of March next respectively. A circular was also sent to each shareholder, dated 4th of November 1863, and signed by the managing director, stating the resolution of the directors in similar terms to those used in the newspaper notice.

It was proved that there was no meeting of the board of directors between the 4th of November 1863 and the 20th of January 1864; and that there was no copy of the advertisement or of the circular entered in the book.

It was specially objected, on the part of the defendant, among other things, that in the resolution the place of payment was not mentioned, and that neither the advertisement in the *Globe* nor the circular letter were the act of the directors, but only of the managing director.

It was held that upon this evidence the plaintiffs had a right to recover, and against this decision the defendant appealed.

K. McKenzie, Q.C., for the appellant, cited the *Newry and Enniskillen R. W. Co. v. Edmunds*, 2 Ex. 118; *The Irish Peat Co. v. Phillips*, 1 B. & S. 629; *Wolverhampton Waterworks Co. v. Hawksford*, 7 C. B. N. S. 795; *Toronto Gas Co. v. Russell*, 6 U. C. R. 567; *London Gas Co. v. Campbell*, 14 U. C. R. 143; *Great North of England R. W. Co. v. Biddulph*, 7 M. & W. 243; *Sheffield R. W. Co. v. Woodcock*, 7 M. & W. 574.

M. Michael and Atkinson, contra, cited *London and Brighton R. W. Co. v. Fairclough*, 2 M. & G. 703.

DRAPER, C.J., delivered the judgment of the court.

The conclusion which we have felt ourselves compelled to

adopt in reference to the sufficiency of the proof that the calls were properly made, renders it unnecessary to express an opinion on the question whether defendant was proved to be a shareholder, and of how many shares.

The provisions of the statute 18 Vict. ch. 211, affecting the former point, are (sec. 2) that the stockholders shall pay up their shares "by such instalments and at such times and places as the directors of the said corporation shall appoint, after notice of not less than two calendar months in that behalf, to be previously given in one or more of the public newspapers published in the city of Toronto, as well as by circular letters addressed by mail to every stockholder (section 18). The directors may lawfully exercise all the powers of the company, and among other powers, they may make and enforce the calls upon the shares of the respective stockholders. . . . But all the powers so to be exercised shall be exercised in accordance with and subject to the provisions of this Act in that behalf." The 25th section relates to actions for calls, and as to proof enacts that "on the trial it shall only be necessary to prove that the defendant was owner of some shares in the undertaking, and that such calls were in fact made, and that notice was given as directed by this Act." The 4th section provides, among other things, for the appointment of a managing director, as to whom, in section 5, are these words, "The director to whom shall be delegated the special management of the business of the society to be called the managing director, and who shall be chosen by a majority of the directors present at their first meeting after the first general meeting of the stockholders," shall serve for four years. General meetings of the stockholders are to be held at Toronto, which (in section 31) is recognised as the place where the head office of the company is; but (section 20) the directors are to hold meetings "at such times and places as they shall appoint."

We feel it only necessary to refer to three English decisions.

In the *Great North of England R. W. Co. v. Biddulph* (7 M. & W. 343) the question arose on a statute very similar

to that under our consideration. The directors resolved on a call of £8 per share, and the resolution mentioned the day for payment, but no place. A notice signed by a clerk (by order) was published according to the provisions of the Act, announcing that at a meeting of the directors a call of £8 per share was ordered to be paid to the treasurer of the company at, etc., on, etc. At the trial it was objected that the resolution ordering the call to be paid did not specify the place, but no objection was made that the notice inserted in the paper was not shown to be the act of the directors. The court upheld a verdict for the plaintiff, *Parke, B.*, saying that as the objection that there was no distinct proof of the publication of the notice being the act of the directors was not taken at the trial, the court must assume it was their act; a narrow ground, but solid, for without its being so assumed the verdict ought not to have been given. *Alderson, B.*, had previously remarked that a notice given by the secretary without the authority of the directors would be bad altogether. Here no opening is left for any similar assumption, for there was evidence negating any further act by the directors after adopting the resolution. The managing director would have no greater authority in this respect than the secretary to bind the company, and the objection was expressly taken at the trial.

In the London and Brighton R. W. Co. v. Fairclough (2 M. & G. 674) the statute did not require that the call, or resolution making the call, should express the time and place of payment. That was left to be stated in the notice, which did contain all that was necessary. It was argued that the secretary who signed it was not shown to have authority to make the publication; but *Tindal, C.J.*, said that such authority must be presumed for an act obviously within the scope of his duty. Here we may presume the managing director's authority to *publish*, though the secretary is named in the resolution; but the board of directors alone has power and authority to *appoint* the place of payment. The case therefore does not advance the plaintiff's argument, because of the difference of the respective statutes.

In the Newry and Enniskillen R. W. Co. v. Edmunds (2

Ex. 118) the resolution that a call be made and one month's notice be given, contained nothing about time or place of payment. The notice signed by the secretary contained both. The only objection taken was that the *resolution* did not state the time and place of payment; and in the following term, after the trial and verdict for the plaintiff, the court refused to grant a rule founded on this objection. *Parke, B.*, said that the resolution to make a call need not specify the time and place of payment, "*but the directors must appoint a time and place*, which must be notified to the shareholders by a notice." The very objection in this case is that the directors have not appointed the place of payment, either by the resolution or otherwise.

The last case we shall refer to is the *Toronto Gas Co. v. Russell* (6 U. C. R. 477), which however applies no further than to show that where there is a statute respecting calls they must be made under the authority and in the words which it prescribes.

Our own experience abundantly affirms the observation of *Parke, B.*, in one of the foregoing cases: "These companies appear perfectly satisfied as soon as they have obtained their Acts of Parliament, and never trouble themselves to look into the clauses, and see what is required to be done by them" (2 Ex. 126). Probably most of the directors among us have occupations of their own engaging their time and attention to such an extent that they have but little to devote to the affairs of the company, or they may reside at such a distance from the company's place of business as to make frequent or prolonged attendance at the board very inconvenient. This may serve to explain the non-observance of the provisions of this and similar Acts, but it furnishes no ground upon which courts can act in determining whether the provisions of their Acts of incorporation have been duly observed, and the powers given legally carried into effect.

In our opinion the appeal must be allowed, and a non-suit entered.

Appeal allowed.

HUSKINSON *v.* LAWRENCE ET AL.*Illegal distress—Action for by third party—Pleading—Tender.*

The first count alleged that one H. held premises as tenant to defendants at a certain rent; that the plaintiff's goods being there defendants wrongfully seized the same, as well as all the tenant's goods, as a distress for alleged arrears of rent, to wit, \$401, then claimed by defendants, and afterwards sold the same for such arrears and costs; whereas only \$38 was really due, for which one-fifth of the goods would have sufficed, and the tenant's goods alone would have been more than sufficient. *Held*, under the authority of *French v. Phillips* (1 H. & N. 654), that the count disclosed no cause of action, for, as a count for distraining for more than was due, it averred no tender of the proper sum, and though the plaintiff could make no tender, he could avail himself of one made by the tenant; and if for excessive distress, it should have alleged distinctly that the distress was excessive and unreasonable, or that the proceeds were more than reasonably sufficient.

The second count, after stating the tenancy and that the plaintiff's goods were on the premises, alleged that defendants wrongfully distrained for arrears of rent the said goods of greater value than such arrears and costs, although a small part would have sufficed, and although the tenant's goods also distrained were of themselves sufficient; and that defendants thereby made an excessive and unreasonable distress for said arrears, contrary to the statute. *Held* good, and that it was clearly unnecessary to allege malice.

DECLARATION.—*First count.*—For that whereas one Thomas Huskinson, before and at the time of the committing by the defendants of the several grievances hereinafter mentioned, held certain lands and premises, with the appurtenances, as tenant thereof to the defendant Orange Lawrence, at and under a certain rent therefor, payable by the said Thomas Huskinson to the said defendant Orange Lawrence. And whereas at the time of the committing of said grievances, divers of the goods and chattels of the plaintiff were upon the said demised premises, as the defendants then well knew, yet the defendants, contriving and intending to injure the plaintiff in this behalf, wrongfully and injuriously seized and took, in and upon the said lands and premises, the said goods and chattels of the plaintiff thereon, of great value, to wit, of the value of £200 (as well as all the goods of the said tenant Thomas Huskinson on the said premises), as and for a distress for certain alleged arrears of rent, to wit, the sum of \$401 ¹⁰/₁₀₀, then claimed and pretended by the defendants to be due and in arrear from the said tenant to the said defendant Orange Lawrence for rent of the said premises. And the

defendants afterwards, under that pretence, wrongfully sold all the said goods and chattels, as well those of the plaintiff as of the said tenant, as such distress for the said alleged arrears of rent, and the costs and charges of the said distress and of the appraisement and sale of the goods and chattels; whereas, in truth and in fact, at the time of the making of the said distress, and during all the time aforesaid, a small portion only, to wit, the sum of \$38 $\frac{20}{100}$ only, of the said pretended arrears of rent so distrained for was in arrear to the said defendant Orange Lawrence for the said rent; and that to satisfy the said sum so actually due, and all the costs and charges aforesaid, a small part, to wit, one-fifth part, of the plaintiff's said goods so distrained and sold would have been sufficient, and might have been distrained therefor; and that the goods and chattels of the said tenant alone, so also distrained and sold, were in fact of themselves more than sufficient to satisfy the same, whereby the plaintiff has lost and been deprived of the said goods and chattels.

Second count.—And for that the said Thomas Huskinson was tenant to the defendant Orange Lawrence of the land and premises in the first count mentioned, at a certain rent, payable by the said Thomas Huskinson to the said Orange Lawrence; that the plaintiff, at the time of the committing by the defendants of the grievances hereinafter next mentioned, had in and upon the said lands and premises divers of his goods and chattels, as the defendants then well knew. And the defendants, intending to injure the plaintiff, wrongfully distrained, for certain arrears of the said rent, the said goods of the plaintiff upon the said premises, of much greater value than the amount of the said arrears, and of the charges of the said distress, and of the appraisement and sale thereof, although a small part of the said goods of the plaintiff was then of sufficient value to have satisfied the said arrears and charges, and might then have been distrained by the defendants for the same, and although the goods and chattels of the said tenant upon the said premises, also distrained by the defendants, were of themselves sufficient to satisfy all such

arrears and charges; and the defendants thereby made an excessive and unreasonable distress for the said arrears, contrary to the statute in such case made and provided, whereby the plaintiff lost and was deprived of his said goods and chattels.

Demurrer to the first count, on the ground that it appears from the said first count that there was some rent due to the defendant Orange Lawrence, and that the wrong complained of is distraining for more rent than was due, for which no action will lie without it being shown that the plaintiff or the alleged tenant tendered to the defendants, or either of them, the rent actually due, with the proper costs of distress.

Demurrer to the second count, on the ground that it is not alleged in said second count, nor does it appear therefrom, that the defendants made the said alleged wrongful seizure maliciously, without which the defendants would not be liable for the alleged excessive distress.

M'Carthy for the demurrer, cited *Bail v. Mellor*, 19 L. J. Ex. 279; *French v. Phillips*, 1 H. & N. 564; *Tancred v. Leyland*, 16 Q. B. 669; *Cochran v. Welsh*, 7 C. P. 21; *Glynn v. Thomas*, 11 Ex. 870; *Field v. Mitchell*, 6 Esp. 71.

Robert A. Harrison, contra, cited Arch. L. & T. 296.

DRAPER, C.J., delivered the judgment of the court.

An action will lie by a party other than the tenant to the landlord of the premises upon which a distress for rent is made, for an excessive distress. *Bail v. Mellor* (19 L. J. Ex. 279), and see *Keen v. Priest* (4 H. & N. 236). The present is an action by such a party, alleging the wrongful seizure of his goods. But we apprehend he stands in no other or better position than the tenant would do if he were claiming for a similar injury. It may be true, as was urged by Mr. M'Carthy, that he can make no tender, but he can avail himself of one made by the tenant.

Acting upon this view, we are of opinion the first count is bad, under the authority of *French v. Phillips* (1 H. & N. 564), and the authorities there cited. We have considered

the latter portion of this count, and Mr. Harrison's argument that the first count is in reality a count for excessive distress, with the additional statement of a bad motive; but this is answered by the observation of *Willes, J.*, in *French v. Phillips*, that a count for excessive distress should allege in distinct terms that the distress was excessive and unreasonable; and, as was further noticed in that case, there is no allegation in this first count that the proceeds of the sale were more than reasonably sufficient to satisfy the arrears of rent and the costs.

But we see no reason for not upholding the second count as sufficient. No authority has been cited to show that it is necessary to aver that the seizure was made maliciously. The words of the statute of Marlbridge are that "distresses shall be reasonable, and not too great." It is plain that malice need not be proved (*Field v. Mitchell*, 6 Esp. 71); and in the latest modern precedents the word is omitted.

We think the defendants should have judgment on the demurrer to the first count, and the plaintiff on the demurrer to the second.

Judgment for defendants on demurrer
to first count, and for plaintiff on
demurrer to second count.

PERDUE v. THE CORPORATION OF THE TOWNSHIP OF CHINGUACOUSY.

*Municipal corporations—Liability for injury caused in repairing highway
—By-law.*

Plaintiff sued defendants for wrongfully cutting a ditch in the highway, and thereby overflowing his land. Defendants pleaded that they necessarily made such ditch in order to repair the highway, doing as little damage as might be, and no more than with due care was necessary for the purpose, which were the grievances complained of.

Held, that the plea was bad, for it alleged a necessity to cut the ditch, but not that the overflow of the plaintiff's land was inevitable.

Seemle, that it was bad also for not admitting any damage.

Quære, as to the validity of such a defence if properly pleaded.

Held, also, that no by-law was necessary to authorize the repair of the highway.

Held, also, following the previous decisions in this court, that the defendants were not entitled to notice of action.

THE DECLARATION complained, in the first count, that

defendants wrongfully and injuriously made and cut a certain ditch in the highway, near the plaintiff's land (lot 26, third concession, east of the centre road, in Chinguacousy), and by means of such ditch so being made and cut, wrongfully and injuriously diverted and turned the course of a certain stream or watercourse, which passed in, through, or across the said common or public highway, and flooded and dammed back the water of the said stream or watercourse upon the said lot of the plaintiff, whereby the grass, soil, and crops of the plaintiff sustained great damage, and the plaintiff was otherwise injured.

The second count alleged that the defendants caused the said ditch, in the said first count mentioned, to be made deeper and wider, and thereby wrongfully and injuriously caused the water of the said stream or watercourse, in the said first count mentioned, to overflow the said lot of the plaintiff to a much larger and greater extent than it had been accustomed to do, and thereby wrongfully and injuriously caused great loss and damage to the soil, crops, and grass of the plaintiff.

Pleas.—3. Setting up want of notice of action.

5. To the first count, that the defendants were incorporated under the Municipal Corporations Acts of Upper Canada, with the corporate powers and authorities conferred and duties imposed upon municipal corporations of townships by the said Acts; and that they were thereby (amongst other things) authorized, empowered, and required to repair and keep in repair every road, street, bridge, and highway, within the jurisdiction of the defendants as such corporation: that the said highway between the third and fourth concessions, in the said first count mentioned, was and is in the township of Chinguacousy, and within the jurisdiction of the defendants, and became and was, before and at the said time when, etc., near to the plaintiff's said land out of repair, by reason of the said highway being there overflowed by water from the adjoining lands. And the defendants being such body corporate as aforesaid, and the said highway so being within their jurisdiction as aforesaid, and so becoming and being in some part thereof, and near

to the said land of the plaintiff, out of good repair and overflowed by water as aforesaid, it became and was the duty of the defendants, under the said Acts, to repair and keep in repair the said highway, and for that purpose to cause to be cut and excavated a ditch along the side of the said highway, to drain the water from the surface thereof, for the more safe, commodious, and convenient passing and repassing, and the communicating thereby of the inhabitants of the said township, within the jurisdiction of the defendants as such corporation; wherefore the defendants, so being such body corporate as aforesaid, in order to improve and repair the said highway, and remove the water from the surface thereof, did at the said time when, etc., necessarily cause to be cut and excavated the ditch in the said first count mentioned, near the plaintiff's said land, and along the side of the said highway leading into the stream or watercourse in the said first count mentioned, and thereby repaired the said highway, and still do keep the same in repair as aforesaid, as they lawfully might and should, they, the defendants, then doing as little damage as might be in that behalf, and no further or other damage or injury to, or in any way further altering or affecting the said stream or watercourse on the plaintiff's said land and property than was necessary, or which by proper diligence and care might be avoided in the execution thereof for the purpose aforesaid—which are the same supposed grievances in the said first count mentioned.

6. To the second count, the same defence—that to repair the road and remove the water they necessarily deepened and widened the ditch, concluding as in the fifth plea.

The plaintiff replied to the third plea, that the said grievances and acts of the defendants complained of by the plaintiff in his declaration were done by the defendants of their own wrong, in this, that the defendants had not, before the committing of the said grievances, passed any by-law authorizing the doing of the said acts from which the said grievances arose, and that the said acts were done by the defendants without any by-law authorizing the doing thereof.

Plaintiff demurred to the fifth and sixth pleas for the following causes: that the said pleas do not show any legal justification for the acts done by the defendants, as charged in the first and second counts respectively, to which those pleas are respectively pleaded, nor is it alleged in either of those pleas that the said acts were done under any by-law passed by the defendants.

The defendants joined in demurrer to the pleas, and demurred to the replication.

J. H. Cameron, Q.C., for the plaintiff, cited *Brown v. The Municipal Council of Sarnia*, 11 U. C. R. 86, 89; *Anderson v. The Great Western Railway Co.*, *Ib.* 126; *Consol. Stat. U. C.*, ch. 54, secs. 331, 337, 358, sub-sec. 4. *Robert A. Harrison*, for the defendants, cited *Croft v. The Town Council of Peterborough*, 5 C. P. 35, 148; *Regina v. The Municipal Council of Perth*, 14 U. C. R. 156; *Snook v. The Town Council of Brantford*, *Ib.* 255.

HAGARTY, J., delivered the judgment of the court.

We think the defendants entitled to judgment on the demurrer to the replication setting up the want of a by-law. For the performance of a statutable duty like the repairs of highways, a work requiring to be done as it were from day to day, we think no by-law necessary. *Croft v. The Corporation of Peterborough* (5 C. P. 35, 141) is in point.

In accordance with the previous decisions of this court, we also hold that defendants are not entitled to notice of action. The question is now pending in the Court of Appeal.*

The fifth and sixth pleas present another question. The plaintiff complains of certain acts done by the defendants in the highway, the effect of which is to throw the water of the stream upon his land to his injury. The defendants say they were performing a legal duty, and as to the consequences use the language set out in their pleas.

* In *Hodgins v. The Corporation of Huron and Bruce*.

The pleas seem open to the objection that they do not confess any cause of action, and avoid it. They do not say, in the words so often met with, "And in so doing did necessarily and unavoidably a little injure," etc., or "throw back a little water," etc., "on the plaintiff's land, doing no unnecessary damage." The pleas are, in substance, "We lawfully did certain acts, and did as little damage to you as we could help." Do they admit they did any damage, and excuse it as necessary in the exercise of their duty to repair? When they say, "Which are the said supposed grievances," etc., have they admitted that there were any grievances? Such a form of answer seems repugnant to our ordinary ideas of pleading.

The case of *Brown v. The Corporation of Sarnia* (11 U. C. R. 89) is the nearest to this case. There the plea (to a claim like this) averred the duty to repair and drain the highway, and that they cut a ditch for that purpose, "doing no unnecessary damage to the plaintiff," *quæ sunt eadem*. This was demurred to.

Robinson, C.J., says, "It is the alleged nuisance which is the gist of the action, and that should either have been traversed, or should in terms have been confessed and avoided. Then if the plea had confessed the occasioning the injury, still we do not think it can be said to justify it. This plea cannot be a sufficient defence, unless we admit that the municipal authorities, in order to drain a highway, may bring down water in any quantity upon the land of an individual, and may leave it to rest or stagnate there, or even to produce any amount of evil and inconvenience to his dwelling-house or other buildings, without showing that the water could in no other way have been got rid of without throwing it on the plaintiff's land, and without showing that it was not in their power to lead it away from the plaintiff's land after they had conducted it thither."

It is not necessary for us to decide whether a plea answering all the requirements suggested by the late Chief Justice would be a complete defence. Without positive legislation, a grave doubt may be expressed as to the absolute right of the conservators of a highway to flood a man's

land and destroy his property, even if no other method of drainage be attainable. Generally, if public convenience requires the destruction of private property, the owner of the latter has the right to be compensated.

However this may be, the pleas before us present no such case. They aver that it was necessary to cut and afterwards to deepen the ditch, but there is no assertion of any necessity for making the plaintiff's land the receptacle for the drainage of the highway.

We think the plaintiff entitled to judgment on demurrer to both these fifth and sixth pleas.

Judgment for plaintiff on demurrer
to the pleas, and for defendants
on demurrer to the replication.

THE QUEEN *v.* HOGG.

Falsely personating a voter at a municipal election is not an indictable offence. Remarks as to the form of indictment in such a case.—

CRIMINAL CASE, reserved from the Court of General Quarter Sessions for the County of Grey, held in September 1865.

The defendant, Nicholas Hogg, was tried and convicted at the said sessions upon the following indictment:—

The jurors for our Lady the Queen upon their oath present, that on, to wit, the third day of January 1865, at the annual municipal election for the election of a member of the municipal council of the corporation of the township of St. Vincent, for the year aforesaid, for ward number two of the said township, holding in the said ward number two, on, to wit, the second and third days of January in the year aforesaid, and at which election two persons, namely, Cyrus Richmond Sing and James Grier, were duly nominated for the said office of councillor for said ward number two of said township of Saint Vincent, and a poll duly demanded, Nicholas Hogg did unlawfully, wilfully, and knowingly personate and

falsely assume to vote and did vote for one of the said candidates, namely, James Grier, in the name of George M'Vittie, whose name appears on the last revised assessment roll, being the assessment roll for the year of our Lord 1864, of and for the said township, as a freeholder of the municipality of the said township, and who is rated on the said last revised assessment roll for real property in said ward number two, held in his own right, and whose name, with the assessed value of the real property for which he was so rated in said ward number two, appears on the proper list of voters furnished for the purposes of the said election to the returning officer for said ward for said year 1865, under section 97, sub-section 2, of chapter 54 of the Consolidated Statutes of Upper Canada.

At the close of the case for the Crown, the counsel for the prisoner asked that an acquittal should be directed on the following grounds:—

1. That there is not a statute of Canada making the personating a voter at a municipal election an offence or crime.
2. That it is not an offence at common law.

The court reserved these questions of law for the consideration of the justices of her Majesty's Court of Queen's Bench for Upper Canada, under the authority of the statute in that behalf.

Robert A. Harrison, for the Crown, cited *Russ. C. & M. II. 539* ; 2 East P. C. ch. 20, sec. 6, p. 1010 ; *Dupee's Case*, 2 Sess. Cas. 11 ; *Rosc. Crim. Ev. 447* ; *The Queen v. Preston*, 21 U. C. R. 86.

M'Carthy, contra, cited *Regina v. Dent*, 1 Den. C. C. 157.

HAGARTY, J., delivered the judgment of the court.

It is conceded that our statute law contains no provision for the punishment of a person falsely personating a voter.

The case cited of *Regina v. Dent* (1 Den. C. C. 159) is in point. *Patteson, J.*, on a similar charge of fraud on the Imperial Municipal Act, decides that such a count discloses no offence at common law. "No case to maintain the affirmative was cited, nor is it believed that any such can be found. . . . The analogy is all the other way."

Section 97, sub-section 9, of our Municipal Act authorizes the oath to be taken by an elector that "he is the person named in the last revised assessment roll;" and section 423 would seem, though very loosely worded, to declare such a false statement to be perjury. It is not, however, necessary to decide this latter point.

Grave objections might be taken to the indictment before us. No averment is apparent negating the identity of defendant with the voter suggested to be personated; and it is open perhaps to be contended that the charge, as it reads, is for personating and voting for the candidate James Grier in the name of George M'Vittie, the voter whose name is on the roll, not for personating George M'Vittie.

We think the conviction cannot be upheld.

MORRISON, J., concurred.

M'GILLIVRAY v. THE GREAT WESTERN RAILWAY COMPANY.

Negligence in construction of railway—Obstruction of watercourse—Action for—Damages recoverable—C. S. C. ch. 66, sec. 83.

The declaration alleged that the plaintiff was possessed of land through which a watercourse was accustomed to flow, and that the defendants so negligently and unskilfully constructed an embankment for the purposes of their railway across the said stream, by not providing sufficient openings for the water, that his land was overflowed.

It was proved that the plaintiff went into possession in 1853, about the time that the railway was commenced, and that the patent issued to him in 1859. The railway passed through his land upon an embankment, and defendants put in a culvert some distance from the channel by which the land had formerly been drained, but it did not answer the purpose, and after this suit had been commenced they made another at the old channel. The plaintiff, in consequence of the overflow, was unable to use several acres which he had cleared, the damage varying both as to time and extent but never wholly ceasing. No evidence was given as to the terms on which defendants obtained their right of way from the plaintiff. The jury found for the plaintiff, who claimed damages for six years, giving \$300.

Held, that the action would lie, there being no presumption from defendants' entry and construction of the railway with the plaintiff's acquiescence, that the plaintiff had obtained compensation for the *negligence* complained of; but that by Consol. Stat. U. C. ch. 66, sec. 83, the plaintiff could not claim damages for more than six months next before the action. As the plaintiff was thus entitled to recover, though not to the extent of the verdict, the court named a sum, \$100, on payment and acceptance of which the rule for a new trial should be discharged without costs.

The declaration stated that the plaintiff was possessed of certain land, the west half of No. 4 in the 6th concession of Zone, through which the waters of a certain swale, slough, stream, creek, or watercourse were accustomed to flow without obstruction, and defendants so negligently and unskilfully constructed an embankment for the purposes of their railway across the said stream, by not providing sufficient openings to allow the water to escape, and by omitting to restore the said stream, etc., to its former state, or in a sufficient manner not to impair its usefulness, and in continuing the embankment in the same state from thence hitherto, that by reason thereof large quantities of water, from thence continually until the commencement of this suit, had been obstructed and flowed over the plaintiff's land, and the same had been injured, etc.

Pleas.—1. Not guilty. 2. Plaintiff not possessed of the lands. 3. Plaintiff not entitled to the flow of the stream through his land.

The case was tried at Chatham, before *Richards, C.J.*, in October 1865.

It appeared that the plaintiff went into possession of this west half of No. 4 in the 6th concession of Zone, in or about 1853, and he put in evidence a patent from the Crown, granting him this half lot in fee as a purchase, dated the 29th of March 1859, so that up to that date the title was in the Crown. When the plaintiff made the purchase, or whether he was the original purchaser or an assignee of the original purchaser, did not appear. It was not shown precisely when the railway was begun, nor when it was finished at the place in question, nor was it definitely stated when it was finished. It seemed that it was begun before the plaintiff went into possession of his land.

In constructing the railway an embankment, six feet high, or thereabouts, was made through this west half lot, beginning at the north-east corner thereof, and passing out very nearly at the south-west corner, on which the ties and rails were laid. The defendants constructed a culvert through this embankment, about 1000 feet easterly from this south-west corner.

It was not shown how the defendants settled or paid for the land thus taken by them, or whether they ever did so, nor whether they made any and what compensation for dividing this west half, or for any other injury the construction might have occasioned to the owner or occupier.

According to the plaintiff's witnesses, the surface of the land generally descends from the north to the south of this half lot, and the surface water could not escape by the course it had taken before the construction of the embankment, and where there was to the south of the embankment a definite channel or creek going southerly across and off from the plaintiff's land. The course the water had thus taken was, according to the plans produced and the evidence, more than a hundred yards east of the culvert constructed by the defendants, though it was stated that the defendants had quite recently constructed another culvert through the embankment, and in or close to the place where the waters had passed southerly before the defendants began their works.

It was proved that the water which collected at this place could not, owing to some ridge of land, pass to the culvert first constructed. The land was divided by dry ridges, between which were swales or low places of greater or less depression, and in them the water would have collected in the spring and after heavy rains if there had been no artificial obstruction, but, according to the evidence, it would pass off, and not prevent the cultivation of the land. Whereas now, it was sworn, the plaintiff wholly lost the use of a number of acres of land, which he had cleared partly or entirely for cultivation; and he claimed for the loss during six years before the commencement of this action.

Evidence of the level of the land was given for the plaintiff to show that the embankment created the mischief. It was also proved that in 1863 the plaintiff applied to three fence viewers of the township to examine and determine what should be done in the way of opening a ditch or watercourse to relieve his land from the water, under Consol. Stat. U. C. ch. 57; and that they, professing to act under that statute, and after the defendants had been notified, awarded that the defendants should dig a ditch across the land occupied by their railway opposite the ditch already dug by the plaintiff (specifying the dimensions of the ditch), and should put in a culvert through the embankment directly opposite the plaintiff's ditch, giving measurements by which to ascertain the precise place; and the fence viewers allowed four months for digging the ditch and building the culvert. It did not appear that any proceedings were adopted for enforcing this award.

On the defence evidence was given to establish that the injury was more justly attributable to the natural formation of the land than to the defendants' constructions.

On the part of the defendants it was objected that the plaintiff did not show any title to a stream, as stated in the declaration, nor give sufficient evidence to entitle him to succeed under the plea of not possessed; that under the 10th section of the statute 16 Vict. ch. 99, the plaintiff was barred, as he had not brought his action within six months from the construction of the railway; that the application

and award under the Fence Viewers Act deprived the plaintiff of any other remedy; that the plaintiff's sole remedy was by arbitration under the defendants' Act of incorporation, and that from the lapse of time it must be inferred that it was resorted to, and the claim decided with the plaintiff's consent.

The learned Chief Justice overruled the objections, but reserved leave to move to enter a nonsuit upon them; and, after the defence was closed, he told the jury they must be satisfied that the defendants had shown some want of skill or care in the construction of their railway, and that in consequence thereof the plaintiff's land had been injured, in which case they should find for the plaintiff; that it was for the plaintiff to establish that the injury of which he complained resulted from the act of the defendants. As to damages, he told them they should give temperate reasonable damages.

The defendants' counsel contended that the plaintiff, if entitled at all, could only recover damages for the six months next preceding the bringing of this action.

The jury found for the plaintiff damages \$300.

Becher, Q.C., obtained a rule calling upon the plaintiff to show cause why a nonsuit should not be entered on the leave reserved, setting out as objections: 1. That the plaintiff established no case. 2. That no stream, slough, or swale, or title to stream, slough, or swale, was shown. 3. That there was no evidence of the plaintiff's possession anterior to the construction of the defendants' railway, and the title was in the Crown during such construction, and until 1859. 4. That the arbitration clauses in the Acts relating to defendants' railway are the proper remedy for the injuries complained of, and not this action. 5. That it must be assumed, as a matter of legal inference, that the injuries complained of have been settled for under the arbitration clauses, or otherwise, from the acquisition by the defendants of the land occupied by their railway and the construction and using thereof. 6. That the action should have been brought within six months from the construction

of the railway, or the time of the commencement of the injury complained of, and the plaintiff is barred by the 10th section of 16 Vict. ch. 99 ;—or for a new trial, for misdirection, in telling the jury they might give damages for the injuries complained of for six years past.

C. Robinson, Q.C., showed cause. He cited *Carron v. Great Western Railway Co.*, 14 U. C. R. 192 ; *Knapp v. Great Western Railway Co.*, 6 C. P. 187 ; *Patterson v. Great Western Railway Co.*, 8 C. P. 89 ; *Moison v. Great Western Railway Co.*, 14 U. C. R. 102 ; *L'Esperance v. Great Western Railway Co.*, 14 U. C. R. 187 ; *Vanhorn v. Grand Trunk Railway Co.*, 18 U. C. R. 360, 9 C. P. 264 ; *Snure v. Great Western Railway Co.*, 13 U. C. R. 376 ; *Wismer v. Great Western Railway Co.*, *Ib.* 383 ; *Cameron v. Ontario, etc., Railway Co.*, 14 U. C. R. 612 ; *Breathour v. Bolster*, 23 U. C. R. 317 ; *Blakemore v. The Glamorgan-shire Canal Co.*, 3 Y. & J. 60 ; *Brown v. Grand Trunk Railway Co.*, 24 U. C. R. 350.

Becher, Q.C., contra, referred to *Wallace v. The Grand Trunk Railway Co.*, 16 U. C. R. 551.

DRAPER, C.J., delivered the judgment of the court.

In this case the defendants built a culvert when they constructed the embankment which the plaintiff complains of as causing him injury. There is as much ground for assuming that this was done to prevent injury to the plaintiff, and upon some agreement to prevent injury, as there is for presuming that the defendants entered upon the land either upon some compromise or agreement, or upon a reference to arbitration under the Act. But any agreement to construct such a culvert involves an admission that the land is exposed to future injury from the embankment, and that the defendants assumed the duty of preventing it by such construction.

Now the evidence given at the trial shows that the culvert was put in a place where it fails to accomplish what was intended, namely, the affording a passage for the surface water to escape. The evidence reasonably establishes that the rain and melted snow would lodge on the plaintiff's land

owing to the conformation of it, as proved, but that it would run off or dry up so as to permit its cultivation ; and till the embankment was erected the land could be drained by a ditch or ditches leading the water from north to south, where there was a running stream to carry it off, as the maps put in show. It must have been foreseen that the embankment, without any culvert, would prevent such natural or artificial drainage ; and if the defendants acquired the land on which to place the embankment without condition or reservation of any kind, the decisions show this would have barred the plaintiff's claim. The defendants offer no evidence of the terms on which they acquired the land, but we have the fact that they did construct a culvert, which, after the verdict, we must take to be insufficient ; and we think we must also assume that in some way it had become obligatory on the defendants to construct it, and that the drainage of the lot was the object proposed ; or it may be perhaps more properly stated, that the preventing damage to the land, by stopping the escape of surface water, was the object, and the duty cast on defendants. The fact that the defendants have recently made another culvert in a different part of the embankment strengthens this conclusion.

When, therefore, the plaintiff declares that the defendants so negligently and unskilfully constructed that embankment, he complains in effect of their not doing effectually what it was their duty to do, and he thus shows a cause of action distinct from that which, but for the defendants' Act of incorporation, would have arisen from the placing the railway on the land in question, and which would be the subject of arrangement or arbitration.

We are bound, from what is now disclosed, to assume that the entry and construction of the railway on this land gave no cause of action to the plaintiff ; that the defendants lawfully erected the embankment where it is ; and that they can only be made liable for the consequences of negligent and unskilful construction, either of what they had a right to do, or of what they had in some way lawfully engaged to do. But we see no sufficient ground for assuming that for this injury, the one declared upon, the plaintiff has ever obtained

any compensation. We view it as a claim arising from a negligent and unskilful execution of work which defendants agreed to do, and which the plaintiff agreed to accept if properly done, as a compensation for the claims he might otherwise have urged for pecuniary satisfaction.

This distinction between the constructing the railway in a negligent and unskilful manner, and damages the inevitable consequence of a construction made in the proper exercise of the powers conferred by the legislature, is clearly pointed out by Sir *J. B. Robinson* in *Vanhorn v. The Grand Trunk Railway Co.* cited in argument.

According to the evidence, the plaintiff's injury arises from the defendants not providing sufficient means for water, which might collect on the surface in natural hollows and wet places on the plaintiff's land north of the railway, to run off into a stream which is south of the railway; in other words, through the embankment, which runs diagonally through the lot. The necessity of such provision is plainly shown, and that it was foreseen, and an attempt made to supply it, in the construction of the embankment. The want of proper skill, and hence the existence of negligence in selecting the place for the first culvert, is shown by the evidence that the surface water accumulates upon the land, and cannot escape through this culvert; and this is confirmed by the fact that since this action was brought the defendants have constructed a new culvert in a different place, and very much in accordance with the suggestions contained in the fence viewers' award, an act pregnant with the admission by defendants of their liability to prevent the plaintiff's land from being damaged by stagnant water.

We have considered the case of *Croft v. The London and N. W. Railway Co.* (3 B. & S. 436, and 9 Jur. N. S. 962). It came before the court on a special case, without pleadings, and involved no question of negligent or unskilful construction. There had been, in 1848, a reference to arbitration, the then owner having preferred a claim under the Land Clauses Consolidation Act, and a sum awarded as compensation for all damages or injury to be sustained by reason of the construction of a tunnel under his houses, etc.; and by deed,

also, in 1848, the then owner, in consideration of, etc., in full of the purchase of the site and the right to construct, maintain, and use the tunnel underneath the said houses, etc., granted the site and full power and authority to construct, etc., underneath the said houses, etc., with uninterrupted right and liberty, at all times for ever thereafter, to use, enjoy, uphold, maintain, and repair the tunnel, freed and discharged from all claims by the owner. In 1849 the tunnel was opened, and in 1853 the plaintiff purchased the premises. Serious injuries were from time to time sustained to the houses by the subsidence of the soil, and by vibration caused by heavy trains passing along the tunnel, subsequent to the award and grant and plaintiff's coming into possession. The court held no action was sustainable by the plaintiff; that the damages might have been foreseen at the time of the arbitration; and that both on the construction of the award and the deed of grant, as well as on the statute, the plaintiff was barred. We have had several cases in our own courts decided on similar principles; and we have referred to it as affording a strong illustration of the distinction stated by Sir *J. B. Robinson* in *Vanhorn v. The Grand Trunk Railway*.

We conclude, therefore, that this action is maintainable.

Then as to damages. We think the language of the 10th sec. of 16 Vict. ch. 99, so similar to that of the 14 & 15 Vict. sec. 20, that the decision in *Vanhorn v. The Grand Trunk Railway Co.* (9 C. P. 264) applies. The damage in this case was variable, both as to time and extent, though probably never wholly ceasing prior to the construction of the new culvert. The soaking of the land by rainfall and melting snow, which could no longer flow down the natural and very gradual descent of the land towards the south, would not show its injurious effect immediately. The plaintiff, it seems, was able to chop the growing trees, though he could not clear off the land. But he cannot, as it appears to us, claim damages under the statute for a longer period than six months next before the bringing of the action. The case of *Blakemore v. The Glamorganshire Canal Co.*, followed by some similar decisions in our own courts, especially the recent case of *Brown v. The Grand Trunk Railway Co.* (24

U. C. R. 350), appear to us to render further observations on this point unnecessary.

On this ground we think the rule must be made absolute for a new trial, without costs. We think it highly probable that the plaintiff will get another verdict so limited, and therefore that both parties should endeavour to avoid so useless an expense. If the plaintiff would accept and defendants would pay \$100 as damages, with full costs up to the day of entering the record, I should be willing to concur in discharging the rule, without costs.*

CAMERON v. GUNN.

Quit claim deed—Construction and effect of.

Defendant being in possession of land, executed a deed by which, in consideration of 5s., he remised, released, and for ever quitted claim to the plaintiff, his heirs and assigns for ever, the said land to hold to the plaintiff, his heirs and assigns, to and for his and their sole and only use for ever. The plaintiff having brought ejectment,

Held, that the deed could not operate as a release, there being no estate or possession in the plaintiff to support it, nor as a conveyance, for want of apt words, and therefore that nothing passed by it. *Nicholson v. Dillabough*, 21 U. C. R. 594, distinguished.

EJECTMENT for lots numbers three and four, in the third concession of the township of Carrick. The plaintiff's notice of title was under "a deed conveying" the land, made by the defendant to the plaintiff, dated 13th February 1865. The defendant asserted title in himself under a grant from the Crown.

The trial took place in October 1865 at Goderich, before *Richards, C.J.*

The plaintiff proved the execution of a deed, dated 13th February 1865, from defendant to the plaintiff, by which defendant, in consideration of 5s., remised, released, and for ever quitted claim to the plaintiff, his heirs and assigns, for ever, the two lots mentioned in the ejectment summons, to hold to the plaintiff, his heirs and assigns, to and for his and

* The plaintiff obtained leave to appeal, but the suit was afterward settled between the parties.

their sole and only use for ever. This deed was duly registered, but it contained no covenants.

It was proved that the defendant had been in possession of the property in question for two years before he was served with the ejectment summons in this cause, which bore date the 4th September 1865.

It was objected for the defendant that the deed was a mere release; that nothing passed by it, as the plaintiff was not in possession when it was executed. It did not contain the words grant, bargain, or sell.

The plaintiff obtained a verdict, leave being reserved to move to enter a nonsuit on the objection taken.

In Michaelmas term *Moss* obtained a rule on the leave reserved, calling on the plaintiff to show cause why a nonsuit should not be entered.

Gwynne, Q.C., showed cause, contending that by the form of the Indenture, expressing that it was made upon a pecuniary consideration, the defendant was estopped from setting up a title contrary to his own deed; that the only difference between this deed and that in *Nicholson v. Dillabough*, 21 U. C. R. 594, was, that the latter was professedly made in pursuance of the Act to facilitate the conveyance of real property, a statement not contained in the present deed.

Moss contra.—There are no words in this deed which can pass the estate, unless the plaintiff had some sort of interest or possession upon which it could operate by way of enlargement. It could not operate as a grant, nor by estoppel. As to *Nicholson v. Dillabough*, the court relied on the deed being made in pursuance of the Act to facilitate the conveyance of real property, and on its containing a covenant that the releasee might enter and take possession. Neither of these particulars are to be found in the deed now under consideration. *Watt v. Feader*, 12 C. P. 294; *Doe Connor v. Connor*, 6 U. C. R. 298; *Preston on Conveyancing*, vol. i. p. 41; *Sanders on Uses*, 61.

DRAPER, C.J., delivered the judgment of the court.

In *Nicholson v. Dillabough*, taking all the deed together—

1, Its being made in pursuance of the Act to facilitate the conveyance of real property; 2, its being made for a valuable money consideration, £75; 3, the habendum was to the party of the second part and his heirs and assigns, to his and their sole use for ever; 4, its containing a covenant that the party of the second part might enter and take possession—the Chief Justice inferred it might be treated as a bargain and sale; and *Burns, J.*, by the reference to *Shove and Pincke* (5 T. R. 124), and to our stat. 14 & 15 Vict. ch. 7, seems to imply that it may operate by way of grant.

Three of these grounds of decision are wanting in this case, the habendum being the only one of the four in which the two are alike, and that alone is not in our judgment sufficient to sustain the plaintiff's contention, and to make a dry release, founded upon a nominal pecuniary consideration, operate as effectively as a conveyance by lease and release would do.

It is necessary that the party to whom a release is made "must have some estate in possession, in deed or in law, or in reversion in deed, of the lands whereof the release is made, to be as a foundation for the release to stand upon; for a release, which must enure to enlarge an estate, cannot work without a possession joined with an estate" (*Shep. Touch.* 324).

There being no such possession in this case, the deed cannot operate as a release, and for want of apt words it cannot operate as a conveyance to pass the estate, which apt words are as necessary since as before the legislature enacted that corporeal tenements and hereditaments should, as regards the conveyancy of the immediate freehold thereof, be deemed to lie in grant as well as in livery. While fully deferring to the authority of the case of *Roe v. Tranmer* (2 Wils. 75), we are compelled to hold that there are no apt words to pass the estate unless by way of release, in which mode the deed cannot operate for the reason above given.

We think therefore the rule must be made absolute.

Rule absolute.

CLISSOLD *v.* MACHELL AND MOSELY.

Action against magistrates—Separate damages against each—Exemplary damages.

In an action against two justices for one act of imprisonment, charged in one count as a trespass and in another as done maliciously, the jury found \$800 against one defendant and \$400 against the other. *Seemle*, that the damages could not be thus severed; but *Held*, no ground for a new trial, as the finding might be treated as a verdict for \$800 against one defendant, the other being let go free by the plaintiff. *Quere*, as to the proper mode of entering the judgment.

One of the defendants having used insulting expressions to the plaintiff during the examination, *Held* no misdirection to tell the jury that they were at liberty to give exemplary or vindictive damages; and that the verdict was not excessive.

ACTION against the two defendants, justices of the peace. The declaration contained two counts, one for trespass and false imprisonment, the other in case for the same imprisonment, charging that it was done maliciously and without reasonable and probable cause. Plea, not guilty by statute.

The trial took place at Toronto in October 1865 before *Adam Wilson, J.*

It appeared that the plaintiff had obtained two search warrants to search the premises of one Buckingdale for some yarn, which, as the plaintiff alleged, had been stolen from him. A constable executed both warrants. The plaintiff accompanied him in order to identify the yarn if found, and did not otherwise interfere. The search was made on both occasions, and nothing was found.

A day or two after the last search Buckingdale went before the defendant Mosely and charged the plaintiff, William Willis, and William Miller, upon oath, with committing a trespass on his (B.'s) house by entering into the house at an improper time, having been forbid so doing. Defendant Mosely issued a summons calling on these three persons to appear before him, or such other justices as might be at the place named, on the 3rd of February 1865.

The plaintiff did not attend, but the other two parties did, and evidence in support of the charge was taken. The proceedings were adjourned, and on the 6th of February the plaintiff was present. The other two parties were discharged. Both defendants sat on the case. No witnesses were then examined, though they were present, but the evidence taken

at the preceding meeting was read over to the plaintiff. The defendant Machell examined the plaintiff, putting a number of questions to him respecting the taking out the search warrant, and telling him that he (Machell) believed the plaintiff purloined the yarn and had got it, and calling him "scoundrel," "villain," and using threatening language towards him. The proceedings were further adjourned to the 8th of February, and then the plaintiff was convicted and fined \$5, with \$5, 50c. costs, and upon this he was committed and sent to gaol on the 9th, and discharged upon a writ of habeas corpus on the 14th of February.

An appeal was also lodged with the Court of Quarter Sessions, and on the 15th of March 1865 the conviction was quashed with costs. Besides the abusive language used towards the plaintiff, it appeared that the defendant Machell, while sitting in this case, used disparaging language respecting other magistrates, and on their jurisdiction over the plaintiff in this matter being questioned, both the defendants concurred in refusing to consider that point.

The learned judge directed that, as the conviction had been quashed, trespass would lie if the defendants had no jurisdiction or had exceeded it; that the plaintiff complained that there was no jurisdiction, or at least excess, because the plaintiff entered the house of Buckingdale under the authority of the search warrant, and also because the defendants had issued a distress warrant in the first instance, contrary to sec. 59, Consol. Stat. C. ch. 103. The learned judge stated that in his opinion it was not made out that the issuing the warrant to commit in the first instance was wrongful, considering the proof of the plaintiff's poverty; and that the second count could only be sustained on the ground of malice and want of reasonable and probable cause. As to damages, he told the jury they might discriminate between the two defendants; and if they did, the plaintiff might elect whether to take the greater amount against one and let the other go.

The jury found for the plaintiff, and assessed the damages as against Machell at \$800, and against Mosely at \$400, the

plaintiff's counsel electing, after some hesitation, to take the verdict in this form.

Anderson obtained a rule calling on the plaintiff to show cause why there should not be a new trial without costs, on the ground that the verdict was against law and evidence, as there was evidence on the first count that the defendants were acting within their jurisdiction; and on the ground of misdirection, in telling the jury that, though the defendants had jurisdiction to inquire into and adjudge as they did, if the evidence before them had been sufficient, yet the evidence before them ousted them of jurisdiction;

And in telling the jury they might assess several damages against two defendants in a joint action of trespass, and in telling them they ought to give damages *in pœnam*.

And for a miscarriage in the verdict, in finding separate damages, and for excessive damages.

Or why there should not be a trial *de novo*, on the ground of such miscarriage.

McKenzie, Q.C., showed cause, citing *Leary v. Patrick*, 15 Q. B. 266; *Rodney v. Strode*, 3 Mod. 101; *Sabin v. Long*, 1 Wils. 30; *Friel v. Ferguson*, 15 C. P. 584.

Anderson, contra, cited *Clark v. Newsam*, 1 Ex. 131; *Gregory v. Slowman*, 1 E. & B. 360; *Mitchell v. Millbank*, 6 T. R. 199; *Cave v. Mountain*, 1 M. & G. 262; *Haylock v. Sparke*, 1 E. & B. 471; S. C. 22, L. J. M. C. 72; *Ratt v. Parkinson*, 20 L. J. M. C. 212.

DRAPER, C.J., delivered the judgment of the court.

Under the Consol. Stat. U. C. ch. 105, sec. 1 (amended by 25 Vict. ch. 22), one justice of the peace has authority to decide in a summary way when a person is charged before him with unlawfully entering into, coming upon, or passing through any land or premises whatsoever, being wholly enclosed, and the property of some other person.

An information was put in evidence laid by Josiah Buckingdale against the plaintiff and two other persons—one of

them, as came out afterwards, a constable—not charging that they entered Buckingdale's house *unlawfully*, but that he had committed a trespass by entering the same at an improper time, having been forbid to do so.

The conviction was that the plaintiff did commit a trespass upon the premises of Buckingdale on the 30th January 1865. Upon this conviction, which was afterwards quashed, the defendants issued a warrant to commit the plaintiff, and he was sent to gaol.

By the 2nd section of chap. 126, Consol. Stat. U. C., it is enacted, among other things, that “for any act done under any conviction, or order made, or warrant issued by such justice in any such matter”—that is, a matter of which by law he has not jurisdiction, or in which he has exceeded his jurisdiction—“any person injured thereby may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this Act,” but by section 3 not “until the conviction or order has been quashed.”

The first count is in trespass, under the 2nd section, treating the act of the magistrates as without or in excess of their jurisdiction. The second count is founded on the 1st section of the statute, treating the act as done in the execution of their duty as justices with respect to a matter within their jurisdiction.

The evidence shows only one state of facts and one act of imprisonment for which the plaintiff complains, and it will sustain either count, depending on the question whether the defendants had jurisdiction, and if so, whether they acted maliciously and without reasonable or probable cause, or whether they had no jurisdiction, or having jurisdiction acted in excess of it.

It appears to us immaterial to the plaintiff's right of recovery upon which count he enters his judgment (Friel v. Ferguson, 15 C. P. 584). The general verdict on the two counts creates no legal objection. We think the evidence abundantly sustains the second count, and I incline to the opinion that on the whole facts it might be held that there was jurisdiction *prima facie* till the facts appeared. Mr.

Anderson cited *Haylock v. Sparke* (1 E. & B. 471). In regard to that case, Lord Wensleydale (in *M'Mahon v. Lennard*, 6 H. L. Cas. 1012) observed that case was not satisfactorily distinguished from *White v. Morris* (11 C. B. 1015), and is not to be preferred to it.

Then as to damages, two points are made: 1st, As to the jury having given several damages; 2nd, as to the direction to the jury that they might give damages *in pœnam*, to teach the defendants not to abuse their position or authority. The question of excessive damages was also raised; but as in our view the verdict cannot be treated as other than a verdict of \$800, we cannot say that, after going carefully through the evidence, we have arrived at the conclusion that it is so grossly extravagant as to justify interference on that ground. The plaintiff might of course take the lesser verdict against both defendants.

We have not found any case in which the judgment in *Hill v. Goodchild* (5 Burr. 2790) has been doubted or denied. Lord Mansfield states that where a trespass is *jointly* charged upon all the defendants, and the verdict has found them *jointly guilty*, the jury cannot assess *several* damages. His Lordship confines the judgment to the particular case, pointing out that the court were not called upon to decide as to cases where the defendants were charged jointly and severally, or had severed in their pleading, or were found guilty of *several* parts of the same trespass.

The doubt thrown out in *Gregory v. Slowman* (1 E. & B. 371) arose upon one of the cases left undecided by Lord Mansfield, the defendants having taken different parts in the transaction, and the defendant Slowman having pleaded a separate defence from the others.

The cases prior to *Hill v. Goodchild* are not to be reconciled. For example, in *Lane v. Santeloe* (1 Str. 79), Parker, C.J., allowed the jury to give £200 against one defendant and £20 against another; while in *Lowfield v. Bancroft* (2 Str. 910), Lord Raymond held the jury could not sever the damages. In *Chapman v. House* (2 Str. 1140), Lee, C.J., held the jury might sever, as the defendants had not pleaded jointly. In *Clark v. Newsam et al.* (1 Ex. 131) the rule was

stated, that the true criterion is the whole injury which the plaintiff has sustained from the *joint act of trespass*; that when the defendants have so conducted themselves as to be liable to be jointly sued, they are responsible for the injury sustained by the common act. And the direction to the jury given by Tindal, C.J., in *Elliott v. Allen* (1 C. B. 18), is in accordance with this criterion. He charged, and the court sustained him, that the plaintiff could only recover damages against all the defendants jointly in respect of any joint act of trespass committed or assented to by them all. The principle is further illustrated by the ruling of *Patteson, J.*, in *Walker v. Woolcott* (8 C. & P. 352).

As to the last point, the learned judge's notes do not contain a statement of the language he used in directing the jury on the subject of damages; but we gather from the manner in which the plaintiff's counsel argued this part of the case that he did not substantially differ from the defendants' counsel as to the character of the charge, and we assume the learned judge did tell the jury they were at liberty to give what are sometimes called exemplary, sometimes even vindictive, damages.

That the jury have this right in certain actions of trespass, and that the court will not interfere with them in the exercise of it, appears clear upon authority. I need only refer to the well-known case of *Merest v. Harvey* (5 Taunt. 442). Nor is it confined to actions of trespass. *Bell v. Midland Railway Co.* (10 C. B. N. S. 287) was an action for injury to the plaintiff's reversionary interest, in which *Willes, J.*, says, "If ever there was a case in which the jury were warranted in awarding damages of an exemplary character, this is that case. The defendants have committed a grievous wrong with a high hand, and in plain violation of an Act of Parliament, and persisted in it for the purpose of destroying the plaintiff's business and securing gain to themselves," referring to *Emblen v. Myers* (6 H. & N. 54). And *Byles, J.*, says, "Where a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in taking that into their consideration, and giving retributory damages."

In the case of *Emblen v. Myers* (6 H. & N. 54), referred to in the case last cited, the judge directed the jury that if they were of opinion that what was done was done wilfully, with a high hand, for the purpose of trampling on the plaintiff and driving him out of possession, they might find exemplary damages. On motion for a new trial, in which this charge was excepted to as a misdirection, the court sustained the verdict. The observations of the judges on this question are well worthy of attention, and there is a note to this case in the American edition which will reward an attentive perusal.

We think, therefore, this rule should be discharged. The plaintiff will have to relieve himself from the difficulty created by the form in which the verdict is taken.

Rule discharged.

TAYLOR ET AL. v. JERMYN.

Lease—Action by lessee for eviction—Justification under forfeiture for non-payment of taxes—Pleading.

Declaration, that defendant demised land to the plaintiffs for six years, covenanting for quiet enjoyment by them if they performed their covenants, which they did, but that defendant evicted them.

Plea, that the plaintiffs by the same deed covenanted that they would during the term pay all taxes, and that the non-fulfilment of their covenants, or any of them, should operate as a forfeiture of the said deed, and that the same should be considered null and void; that during the term certain taxes were imposed on the land, amounting to \$8, 55c. for municipal, and \$9, 55c. for school purposes, for 1863, which the plaintiffs did not pay, although the same were duly demanded, and they had no distress on the land; and such taxes in March 1864 were returned by the collectors as due on non-resident lands, whereby the said deed and the term became forfeited and void; and defendant afterwards peaceably entered, and became possessed as in his first estate.

Held, on demurrer, that the plea was sufficient:—that the taxes became due when demanded, and plaintiffs had not the whole term to pay them in; that defendant could enter without bringing ejectment; and that it was unnecessary to set out every requisite to show a valid rate, there being a distinction in this respect between an avowry and a justification.

DECLARATION.—*Second count*.—That the defendant by deed dated the 1st of October 1862 demised and leased to the plaintiffs all that certain land (described) for the term of six years from the said first day of October 1862. And the

defendant by the said deed covenanted, among other things with the plaintiffs, that if they, the said plaintiffs, should and did during the said term pay the yearly rent by the said lease reserved, and perform the covenants therein contained, they, the said plaintiffs, should and might peaceably enjoy the said premises, during the said term, without any lawful denial, let, molestation, hindrance, or disturbance whatsoever, of, from, or by the defendant, his heirs or assigns, or any person or persons claiming through, under, or in trust for him. And the plaintiffs say that they did pay the reserved rent, according to the terms of the said deed, and perform all the covenants and conditions in the said deed contained to be by them performed and observed; yet the defendant, in breach of his covenant in that behalf, during the said term entered upon the said demised premises, and molested, hindered, and disturbed the plaintiffs in their enjoyment thereof, and prevented the plaintiffs from peaceably and quietly enjoying the said premises, and evicted the plaintiffs therefrom, whereby, etc. etc.

Plea.—That the said plaintiffs covenanted with the defendant, in and by the said deed, that they would during the said term discharge and pay all rates, taxes, and impositions thereafter to become payable in respect of the said premises, and did further subsequently covenant with the said defendant, in and by the said deed, that the non-fulfilment of the covenants thereinbefore mentioned, or any of them, on the part of the said plaintiffs, should operate as a forfeiture of the said deed, and the same should be considered null and void to all intents and purposes. And the defendant says that afterwards, and during the term created by the said deed, certain taxes were imposed and rated and payable upon the said lands, and in respect of the said premises, amounting to the sum of \$8, 55c. for municipal purposes, and the further sum of \$9, 55c. for school purposes, for the year 1863, and the plaintiffs did not pay the same, or any part thereof, although the same was duly demanded, and did not have any goods or chattels on the said lands as a distress sufficient to pay the same, and the said taxes were on the first day of March 1864 returned by the collectors of the

said taxes respectively as due on non-resident lands, whereby the said deed and the term thereby created became forfeited, and null and void to all intents and purposes. And that afterwards, to wit, on the 2nd of April then next following, the said defendant peaceably and quietly entered into and upon the said demised lands, and became possessed thereof as in his first and former estate, doing no unnecessary damage to the plaintiffs.

The plaintiffs demurred to this plea on the following grounds:—

1. That it does not appear at what time the taxes of 1863 were payable, or at what time the plaintiffs were in default, and it does not appear that payment of the said taxes was ever demanded by the collector from the plaintiffs.

2. For all that appears the plaintiffs may have paid said taxes prior to the defendant's entry on said premises, notwithstanding the return of the collector's roll.

3. That it does not appear that a reasonable time for the payment of said taxes had elapsed before the said defendant re-entered.

4. That it appears from said plea that the plaintiffs had the whole of the term to discharge and pay said taxes, and it does not appear that the defendant had paid them, or been in any way damnified by the non-payment of them.

5. That it is apparent that the covenant relating to the payment of taxes during the term is not one the breach of which would work a forfeiture under the terms of said lease.

6. That the defendant had no right to re-enter of his own motion without bringing ejectment, and the pleadings herein do not show that the plaintiffs had abandoned the possession of the premises in question.

Boyd, for the demurrer, cited *Yaw v. Leman*, 1 Wils. 21; *Haacke v. Marr*, 8 C. P. 441; *Wilson v. Rorke*, 2 U. C. R. 437; *The Queen v. Haystead*, 7 U. C. R. 9; *The Queen v. The Mayor of New Windsor*, 7 Q. B. 908; *Wentworth Prec. Plg.* iii. 511.

Crombie, contra, cited *Davis v. Burrell*, 10 C. B. 821.

HAGARTY, J., delivered the judgment of the court.

As to the first objection, the plaintiffs declare on a lease for seven years, from the 1st of October 1862. The plea avers that during the term taxes were imposed for the year 1863, which the plaintiffs did not pay, although the same were lawfully demanded. We do not think it necessary to aver that the collectors demanded them. The default was thus apparently complete, and defendant's right of entry at once available.

The second, third, and fifth objections require no notice.

The fourth objection sets up that the plaintiffs had the whole term to pay taxes. The covenant was to pay all taxes to become payable in respect of the land. This must mean to pay them as they become payable, in proper time for so doing. We think they became payable certainly when demanded, as it is alleged they were, and the return of the roll to the treasurer with unpaid taxes appearing as a lien upon the land entails trouble and expense on the owner or person interested in the land. The forfeiture may be complete without any actual damage sustained by defendant.

On the sixth objection, we do not think that the defendant was put to bringing ejectment. The term was forfeited; the lease was null and void; and he avers that he entered peaceably as in his former estate. The action is brought for an alleged entry and eviction, and the covenant for quiet enjoyment is equally broken by any disturbance by defendant of the plaintiffs' possession.

It was argued for the plaintiffs, though not assigned as ground of demurrer, that the plea should have averred every requisite to show a valid rate; and *Haacke v. Marr* (8 C. P. 441) was relied on.

That case decided that an avowry in replevin for a distress for school rates, being in the nature of a declaration, and where a return is sought, must show a good title *in omnibus*. But the same case recognises the distinction between a justification to an action of trespass and an avowry.

It appears reasonable to apply the same distinction to a plea answering an alleged breach of covenant. The defendant here is a stranger to all connected with the imposition

and levying of the rates. He is not, like the avowant in *Haacke v. Marr*, an actor in carrying out and enforcing the rate. *Davis v. Burrell* (10 C. B. 824), cited by *Mr. Crombie*, has some bearing upon this case, as showing that the default, for example, of the collector to make a demand for taxes cannot prejudice the landlord's right of entry for non-payment.

Judgment for defendant, on demurrer.

HUNT v. M'ARTHUR.

False imprisonment—Plea in abatement—Prior action pending.

To an action of trespass for assault and false imprisonment defendant pleaded a prior action pending for the same cause. It being admitted that the former action was on the case—*Held*, that it was not for the same cause, and that the plea, therefore, was not proved.

DECLARATION.—The first count for assault and false imprisonment; the second, for assault and procuring a constable to arrest plaintiff, and causing plaintiff to be imprisoned.

Plea.—Praying judgment of the writ and declaration, and that the same may be quashed, because before this suit the plaintiff issued a writ of summons out of the Court of Queen's Bench against defendant for the same cause of action, as by the record and proceedings thereof remaining in the said court appears, and the said former suit is still depending in the said court. Verification, etc.

The plaintiff joined issue on this plea.

The issue came on for trial at London, in October 1865, before *Richards, C.J.*

It was admitted that an action on the case was brought against the defendants, as set out in the plea; that this action was for the same arrest as that referred to in the declaration in the former suit; and that in that suit judgment never was entered. The plaintiff was nonsuited in the former suit.

The learned Chief Justice directed a verdict for the defendant.

Robert A. Harrison obtained a rule, calling on the defendant to show cause why the verdict should not be set aside, and the plaintiff have liberty to enter a judgment of *respondeat ouster*, or such other judgment as he may be in law entitled to enter herein, upon the ground that the action for trespass and the action for malicious prosecution are perfectly distinct, and if not, the nonsuit in the action for malicious prosecution having been ordered by rule of court, sufficiently disposes of the action for malicious prosecution to enable the plaintiff to maintain an action of trespass; or for a new trial, on the ground of misdirection, in directing that on the admissions the defendant was entitled to a verdict.

Becher, Q.C., showed cause, citing *Tay. Ev.* 4th ed. 1434; *Add. Torts*, 859.

Harrison, contra, cited *Bays v. Ruttan*, 5 U. C. R. 634; *Hunt v. M'Arthur*, 24 U. C. R. 254.

DRAPER, C.J., delivered the judgment of the court.

At the trial no evidence whatever was given, but all proceeded upon verbal admissions, which the learned Chief Justice has stated in his report. These admissions seem to have been intermixed with the discussion of the question whether the plea was an answer to the action upon the facts stated. In the argument before us, also, statements were made as to the proceedings *in banc* in the former action, on a rule to order a nonsuit to be entered, which do not form part of the admissions at the trial. We have found this a very unsatisfactory mode of proceeding, and have felt it difficult to say upon what precise state of facts our judgment is to be given.

We assume, however, that an action on the case was brought against the defendant for the same imprisonment which is complained of in the declaration. Neither the declaration nor the pleas in that action are in evidence. In the course of argument on the trial of this cause it seems to have been asserted that the plaintiff was nonsuited, but it forms no part of the admissions. There is therefore nothing

to show that the former action is yet at an end; no judgment is shown to have been entered; and so far the plea appears sustained.

But in the action now before us the declaration complains of an assault and false imprisonment—of a direct wrong done by defendant to plaintiff. The former action is admitted to have been an action on the case, and we must infer charged the arrest and imprisonment to have been malicious and without reasonable and probable cause. This being so, the plea is not proved in the allegation it contains that the former writ of summons was issued for the same cause of action as is stated in this declaration. The cases of *Chivers v. Savage* (5 E. & B. 697) and *Guest v. Warren* (9 Ex. 379) are clear authorities upon the point of law; and we think, as the result, that the proper course is to make the rule for a new trial absolute, without costs.

Where the defendant pleads in abatement, and the plaintiff demurs, and the plea is disallowed, the judgment is not final, but only that the defendant answer over. But if the plaintiff take issue, and it be found against defendant, then final judgment is given against him. And if issue be taken on a plea in abatement, and it be found for the plaintiff, he must take care that the same jury assess the damages, for if not a *venire de novo* must be awarded (2 Saund. 211, note 3; *Eichorn v. Le Maitre*, 2 Wils. 367).

Rule absolute.

BLETCHER v. BURN, AND BLETCHER v. MARSH AND EVERITT.

Replevin—Satisfaction—Costs—Attorney's Lien.

The plaintiff having recovered judgments against B. and his sureties on a replevin bond, for not prosecuting without delay an action of replevin for a schooner, B. moved to have satisfaction entered, showing that a decree in Chancery had established his title to the property, so that the delay had not injured the plaintiff. The plaintiff's attorney claimed a lien on the judgments for his costs as between attorney and client, not only in these suits, but in other actions between the parties upon the same subject of litigation.

Held, that he was entitled only to the taxed costs as between attorney and client in the suits; and satisfaction was ordered to be entered on payment thereof.

Hector Cameron obtained rules *nisi* in both causes (the defendants in the second cause being the sureties of defendant Burn in the first cause), calling upon the plaintiff

to show cause why he should not enter satisfaction in the several causes, and withdraw all writs of execution, the defendant Burn giving credit for the costs taxed, and the costs of the executions in both cases, on account of the damages and costs payable under the decree in Chancery referred to in the affidavits filed—on the ground that the defendant Burn had been held to be the owner of the schooner mentioned in the pleadings herein by the final decree in the Chancery suit, and that the plaintiff had therefore sustained no damages in respect of the causes of action for which the judgments were recovered; and on grounds disclosed in the affidavits and papers filed.

In support of the applications the affidavit of the defendant's attorney was filed, which stated that the judgments were entered on the 16th of March 1865; that the plaintiff issued writs of execution thereon, indorsed to levy the sum of \$10,114.50 interest, and charges for writs; that the cause of action in those causes was the failure of the defendant Burn to prosecute without delay an action of replevin for the schooner *Jane Ann Marsh*; and that the reason why the defendant Burn did not proceed with the action of replevin was that after its commencement he had acquired another title to the schooner paramount to his former title, and that he filed a bill in Chancery to establish his rights; that the Court of Chancery made a final decree, deciding that the plaintiff's title to the schooner was void against the defendant Burn, and that Burn had been the lawful owner since March 1862, which was anterior to the commencement of these actions; and that the plaintiff could have sustained no damages whatever by the delay in prosecuting the action. The affidavit further showed that under the decree Burn will be entitled to have a large amount of costs taxed against the plaintiff, as well as a large sum for the freight and earnings of the schooner while in the plaintiff's possession; and that the defendants' attorney applied to the plaintiff's attorney to have the judgments in both causes released and satisfaction entered thereon, the defendant Burn offering to allow the costs in both judgments to be set off against the costs and damages in the Chancery suit,

and that he was informed by the plaintiff's attorney that he would advise the plaintiff to release the said judgments and withdraw the executions on payment of the costs, but would not consent to set off the costs. It appeared also from the affidavit that the plaintiff was insolvent.

J. H. Cameron, Q.C., showed cause, and filed an affidavit of the plaintiff's attorney, who swore that large sums of money were due to him from the plaintiff for costs in these causes, and for costs in other actions involving the same questions of litigation between the parties; that he claimed a lien on the judgments and executions for his costs, and that his costs in the causes were more than the taxed costs in the judgments; that he had no security; and that if he was deprived of his lien on the judgments he would lose the costs altogether.

He contended that the plaintiff's attorney was entitled to a lien on the judgments, not only for costs in these causes as between attorney and client, but also for costs incurred in other actions brought by the attorney for the plaintiff, citing *Paterson, M. & M. Prac.* 504; *Munt v. Munt*, 7 L. T. Rep. N. S. 438; *Little v. Philpotts*, 8 Jur. N. S. 1175, 2 B. & S. 383; *O'Brien v. Lewis*, 9 Jur. N. S. 620.

Hector Cameron supported his rules, and contended that the attorney was entitled to the taxed costs as between party and party, and he claimed under the circumstances to have such costs set off against the costs and damages in the Chancery suit (*Ch. Arch. Prac.* 1731; *Harrison v. Bainbridge*, 2 B. & C. 800; *Ruttan v. Short*, 12 U. C. R. 485; *Bank of Upper Canada v. Thomas*, 10 Grant, 356).

MORRISON, J., delivered the judgment of the court.

The only question for determination is, to what extent the plaintiff's attorney is entitled to assert a lien on these judgments, other than for the taxed costs between party and party in each case. We can find no authority to the effect that he is entitled, upon an application like this, to any further lien than the costs arising in the cause; and the case of *Watson v. Maskell* (1 Bing. N. C. 727) establishes

that the costs he is entitled to are such as would be due to the plaintiff's attorney upon taxation between attorney and client. The rules will therefore be absolute to enter satisfaction on the respective judgments, on payment of such sums to the defendants' attorney as the Master shall find the attorney entitled to, as costs between attorney and client, in the two causes.

Rules accordingly.

HUGHES v. PAKE, NAYLOR, ROUSE, AND JOHNSTON.

*School Acts—Arbitration between trustees and teacher—C. S. U. C. ch. 126
—Evidence of agreement—Form of award.*

Held, following *Kennedy v. Burness*, 15 U. C. R. 487, that arbitrators between school trustees and a teacher, under the U. C. Common School Act acting within their jurisdiction, are entitled to protection under Consol. Stat. U. C. ch. 126, as persons fulfilling a public duty; and therefore that trespass would not lie against them and their bailiff for seizing goods to enforce their award under section 86.

It was contended that the arbitrators had no jurisdiction, as no contract under the corporate seal, required by 23 Vict. ch. 49, sec. 12, was proved to have been produced before them; but the plaintiff's witness said an agreement was produced which he thought had the seal, and the plaintiff, as a trustee, had named an arbitrator and submitted the matters in dispute. *Held*, that under these circumstances it might be assumed that the arbitrators had before them all that was necessary to give jurisdiction.

Held, also, that the award set out below was sufficient; and that the Act 23 Vict. ch. 49, sec. 9, which directs that no want of form shall invalidate such awards, should receive a liberal construction.

TRESPASS *de bonis asportatis*. *Plea*, not guilty, per statute. The defendants appeared by different attorneys, and the statutes noted in the margin of the pleas were Consol. Stat. U. C. chaps. 19, 64, 65, and 126; also 18 Vict. ch. 131, 16 Vict. ch. 180, and 26 Vict. ch. 5.

The case was tried at the last Belleville assizes, before *Draper, C.J.* From the evidence it appeared that the plaintiff was a trustee of the Roman Catholic separate school No. 20, in Thurlow, of which school one Ann M'Gurn was teacher; that she claimed nine and one-half months' salary as being due to her; that the matter being in dispute, M'Gurn, under sub-section 2 of the 84th section of the U. C. School Act, addressed a notice in writing, dated the 28th of April 1864, to the trustees of the school section (of which the plaintiff was one) requiring the matter in dispute to be submitted to arbitration, naming in such notice her arbitrator, and notifying the trustees to name one; the defendant

Rous, who was the local superintendent, being the third arbitrator by virtue of the statute; that the trustees, at the instance of the plaintiff, named and duly appointed the defendant Pake the arbitrator on their behalf; that the three arbitrators met on the 2nd of May, and on that day the arbitration was entered upon and concluded, and their award made and signed by the three arbitrators, and on the same day it was handed to the trustees, and they were cautioned they would be liable personally if the amount awarded was not paid within a month. It also appeared in evidence that after the month's notice had expired, the arbitrators caused the three trustees to come before them, and that they, the arbitrators, "gathered from them" (the trustees) "that they levied no rate, made no money, and paid none;" that the arbitrators, in the beginning of July, issued their warrant, directed to the defendant Johnston as their bailiff, to distrain and seize the goods of the three trustees, under which warrant Johnston seized and sold the goods of the plaintiff. The chief witness called by the plaintiff was the defendant Rous, who testified to the facts stated. He also said that an agreement, made between the trustees and the teacher, M'Gurn, was produced before the arbitrators, and which he thought was under the corporate seal, but on this point he was not sure one way or the other. Patrick Reagon, one of the trustees, was also called by the plaintiff, and he stated in his evidence that he was served with a notice of the award, and that the plaintiff told him he had also been served with a like notice; that the plaintiff was the treasurer of the trustees; that prior to the 19th of May he had collected part of the money from the school section, and that he did not pay over the amount of the award.

At the close of the plaintiff's case *Diamond*, on the part of the plaintiff Rous, moved for a nonsuit, on the ground that he was a public officer, acting under the 3rd sub-section of the 84th section of the U. C. School Act; that the action should have been case; that there was no allegation or proof of the defendant having acted maliciously or without probable cause, and that he was entitled to the protection of the Act

to protect trustees and other officers from vexatious actions. *Holden*, for the arbitrators, defendants Pake and Naylor, made the like objections; and *Dougal*, for the defendant Johnston, contended that as bailiff he was entitled to the same protection.

It was agreed, with the consent of the learned Chief Justice, that the defendants should have leave to move to enter a nonsuit on the objections taken, and the question of damages was left to the jury, which they found to be \$71.

Diamond, in pursuance of leave reserved, obtained a rule *nisi* to set aside the verdict and to enter a nonsuit as to defendant Rous, on the ground that the action should have been case, under Consol. Stat. U. C. ch. 126, sec. 1; that it was proved at the trial that Rous was an officer performing a public duty; that it was not proved he acted maliciously and without reasonable or probable cause, but that he was acting *bonâ fide* in reference to the making of the award and issuing the warrant which formed the subject-matter of this action, and that he was consequently protected by ch. 126 above mentioned; and that no cause of action was proved. *C. S. Patterson*, on behalf of the defendants Pake and Naylor, obtained also a rule *nisi* to enter a nonsuit, on the ground that they were arbitrators appointed under the U. C. School Act, and were within the protection of ch. 126, and that trespass would not lie against them. And *Robert A. Harrison*, on behalf of defendant Johnston, also obtained a like rule, setting out similar grounds, that if the arbitrators were entitled to protection, he, Johnston, was equally so entitled, etc.

The three rules came on for argument together. *Jellet* showed cause, and *Patterson*, *Harrison*, and *Diamond* supported their respective rules, citing *Kennedy v. Burness*, 15 U. C. R. 473; *Sage v. Duffy*, 11 U. C. R. 30; *Spry v. Mumby*, 11 C. P. 285, 288; *Waddell v. Chisholm*, 9 C. P. 125; *Davis v. Williams*, 13 C. P. 365; *Helliwell v. Taylor*, 16 U. C. R. 279; *Hardwick v. Moss*, 7 Jur. N. S. 804; *Bross v. Huber*, 15 U. C. R. 625.

The statutes cited are referred to in the judgment.

MORRISON, J.—By the 84th section of “The Upper Canada Common School Act,” it is enacted that, “in case of any difference between trustees and teacher, in regard to his salary, the sum due to him, or any other matter in dispute between them, the same shall be submitted to arbitration, in which case:

1. Each party shall choose an arbitrator.
2. In case either party in the first instance neglects or refuses to appoint an arbitrator on his behalf, the party requiring the arbitration may, by a notice in writing to be served upon the party so neglecting or refusing, require the last-mentioned party, within three days inclusive of the day of the service of such notice, to appoint an arbitrator on his behalf, and such notice shall name the arbitrator of the party requiring the arbitration; and in case the party served with such notice does not, within the three days mentioned therein, name and appoint an arbitrator, then the party requiring the arbitration may appoint the second arbitrator.
3. The local superintendent, or in case of his inability to attend, any person appointed by him to act in his behalf, shall be a third arbitrator, and such three arbitrators or a majority of them shall finally decide the matter.”

The 85th section enacts that the arbitrators may require the attendance of the parties and witnesses, books, etc., and administer oaths, etc.

The 86th section authorizes the arbitrators, or any two of them, to issue their warrant to any person named therein to enforce the collection of any moneys awarded to be paid, and the person named in such warrant shall have the same powers and authority to enforce the collection of the moneys mentioned in the warrant, etc., by seizure and sale of the property of the party against whom the same has issued, as any bailiff of a Division Court has in enforcing a judgment and execution issued out of such court.

The 87th section enacts that no action shall be brought in any court of law or equity to enforce any claim or demand between trustees and teachers which can be referred to arbitration as aforesaid.

And by the 9th section of 23 Vict. ch. 49, it is declared that if the trustees wilfully refuse or neglect, for one month after publication of award, to comply with or give effect to an award of arbitrators appointed as provided by the 84th section of the Upper Canada School Act, the trustees so refusing or neglecting shall be held to be personally responsible for the amount of such award, which may be enforced against them individually by warrant of such arbitrators within one month after publication of their award; and no want of form shall invalidate the award or proceedings of arbitrators under the School Acts.

It was contended on the part of the plaintiff that the arbitrators had no jurisdiction to make any award, as no contract under the corporate seal of the trustees was proved to have been produced before them—the 12th section of 23 Vict. ch. 49, enacting that all agreements between trustees and teachers to be valid and binding shall be in writing, signed by the parties thereto, and sealed with the corporate seal. But it was proved by the plaintiff's witness that an agreement was produced before the arbitrators, and the witness thought under the corporate seal; and as the plaintiff, as a trustee, named an arbitrator, and submitted the matter in dispute to the arbitrators, we may, under these circumstances, assume that the arbitrators had all the necessary materials before them to give them jurisdiction to enter upon the arbitration and make the award.

It was also objected that the award was informal; that there was no award, as it was not made in terms between the corporation and the teacher. The award put in evidence was in the following words:—

“At an arbitration, held May the 2nd, 1864, to decide a dispute between the trustees of the Roman Catholic separate school No. 20, Thurlow, in the village of Canifton, and Miss Ann M'Gurn, teacher in said section, the following were the arbitrators: Wm. Naylor on behalf of Miss M'Gurn; S. S. Pake on behalf of the trustees; F. H. Rous, Local Superintendent of Hastings. After hearing the evidence, and considering the case fully, the arbitrators decide and award that the trustees of said section shall forthwith pay into the

hands of Mr. Rous the sum of sixty-four dollars twenty-two and one-half cents, such sum to be disposed of as follows:—

To Miss M'Gurn	\$59 12½
Expenses of arbitration	5 10
	<hr/>
	\$64 22½

(Signed) SAMUEL S. PAKE.
WILLIAM NAYLOR.
F. H. ROUS, L. Sup. S. Hast.

Belleville, May 2, 1864.

The 17th section of the Separate School Act, Consol. Stat. U. C. ch. 65, declares that the trustees of each separate school shall be a body corporate, under the name of the Trustees of the Separate School of (as the case may be), in the township, city or town (as the case may be) of, etc.; and, as before stated, the latter part of section 9 of 23 Vict. ch. 49, enacts that no want of form shall invalidate the award or proceedings of arbitrators under the School Acts.

The object of the legislature was to give a simple, speedy, and inexpensive mode of settling disputes between trustees and teachers by arbitration, and it probably assumed that it might frequently happen that arbitrators would be appointed from a class unacquainted with the drawing up awards in a technical form; and in order to avoid expense and litigation, and to give effect to the adjudication of the arbitrators when acting within their jurisdiction and powers, provided against their awards becoming inoperative from want of form. Such being the case, I think it is incumbent on us to give the most liberal construction to the provisions of the statutes, with a view of carrying into effect the intentions of the legislature; and where we can see, as in the present case, on the face of the award itself, that in all material points it is sufficiently certain, although informal in some respects, to strive to uphold it. And in my judgment the objections taken to the award are to matters of form, within the meaning of the enactment, and they do not render the award invalid.

Upon the other point in the case, and which was the principal one argued at the bar—whether the arbitrators and

their bailiff were within the protection of the statute for the Protection of Justices of the Peace and other officers from vexatious actions—I am of opinion that they are. Arbitrators such as these defendants were, are, by force of the common School Acts, upon their appointment constituted a tribunal upon whom is cast the duty of determining the rights and liabilities of the parties concerned, and indeed the only one to which the parties can resort to ascertain their rights (see section 87 above quoted, and *Tiernan v. School Trustees of Nepean*, 14 U. C. R. 15); and the legislature has invested them with authority, in the event of non-compliance with their award, after the period mentioned in the statute, to enforce obedience by the issuing of their warrant to seize and sell the goods of the trustees, clothing the person to whom they direct their warrant with the same power and authority for its execution as a bailiff of the Division Court.

It therefore appears clear to me that these defendants were persons fulfilling a public duty imposed by Act of Parliament, and that this action is brought against them for acts done by them in the performance of such public duty, and that they are consequently within the protection of ch. 126, the 1st section of which enacts that such an action shall be an action on the case as for a tort, and in the declaration it shall be expressly alleged that the act complained of was done maliciously and without reasonable or probable cause, and that if upon the trial, the general issue being pleaded, the plaintiff fails to prove such allegation he shall be nonsuited, etc. Here the action is one of trespass, and the evidence adduced by the plaintiff on the trial negatived, in my opinion, malice and want of probable cause.

In *Kennedy v. Burness et al.* (15 U. C. R. 487) *Sir John Robinson*, in giving judgment, and discussing the question whether trespass would lie against the arbitrators in that case, says: “It would not lie, I think, if the arbitrators had jurisdiction in the matter in which they acted, because then their making the award in favour of the teacher in a matter within their jurisdiction would be a legal act, and the issuing of the warrant to enforce the award is enjoined upon them

by the legislature. If they took an erroneous view of the merits, and mistook the law, or came to an unsound conclusion upon the evidence, when the matter referred to them was within their jurisdiction, that would not make them trespassers. They would be protected, as justices would be protected who are authorized by statute to determine differences between masters and servants"—referring to *Lowther v. Earl of Radnor*, 8 East, 113.

Upon the whole case I am of opinion that our judgment should be in favour of the defendants, and that the rules be made absolute to enter a nonsuit.

DRAPER, C.J.—If this question were *res integra*, I should have taken further time to consider before adopting any conclusion. But agreeing in the general views expressed by my brother *Morrison* as to our giving a liberal interpretation to the Act in favour of those called upon to give effect to its provisions, I am prepared to adhere to the opinion already expressed in this court, and cited in the judgment just delivered. I treat that opinion as deciding the point until it shall be overruled by a higher authority, and therefore concur in making the rules absolute to enter a nonsuit.

HAGARTY, J., concurred, saying that he thought the point settled by the case referred to.

Rules absolute.

STEVENSON ET AL. v. CALVIN ET AL.

Injury to vessel—Damages—Freight.

The plaintiffs had undertaken to carry a cargo of stone in their schooner from C. to P., and had got as far as K., where she was injured by the negligence of defendants' servants in towing her. The stone was forwarded by defendants to P. In an action brought by plaintiffs for the injury, *Held*, that they could not recover as damages any part of the freight, for they might adopt the defendants' act and recover the whole from the consignees.

THIS was an action brought to recover damages to the plaintiff's schooner *Rapid*, caused by the negligent and unskilful management of the defendants' servants in towing the *Rapid* with the defendants' steam tug-boat the *William*; to which the defendants pleaded not guilty.

It was tried at Kingston before *Gwynne, Q.C.*, sitting for *Hagarty, J.*

Among other items of claim was one for \$444, 30c., arising in this way: The *Rapid* was loaded with stone at Cleveland, to be delivered at Prescott. She had reached Kingston, and there was injured, as complained of in the declaration. The whole freight of the stone, if delivered, was \$944, of which one of the plaintiffs had received \$500. The stone was conveyed after the accident from Kingston to Prescott by the defendants, and was delivered there.

The learned Queen's Counsel held that under these circumstances the plaintiffs could recover the whole freight from the consignees, and therefore should not be allowed for any part of it in this action, but he reserved leave to the plaintiffs to move to increase their verdict by the sum of \$444, if the court should be of opinion that the plaintiffs were entitled, on the facts appearing, to recover it in this action.

J. H. Cameron, Q.C., obtained a rule *nisi* on the leave reserved, to which

Kirkpatrick, Q.C., showed cause, contending, among other things, that as the plaintiffs had among the items of their claim included a charge of \$16 *per diem* as the net value of the vessel's earnings for eighty-nine days from the time of the accident early in September, to the end of the season, they could not also claim the freight to be earned for carrying this stone during that same time.

Cameron, Q.C., in support of the rule, cited *The Mellona*, 3 Robinson's Admiralty Reports, 25; *The Columbus*, ib., 158; *The Clarence*, ib., 283; *Mayne on Damages*, 221.

DRAPER, C.J., delivered the judgment of the court.

We have not derived much help from the cases referred to. But as we understand the case, the plaintiffs had undertaken to carry this load of stone from Cleveland to Prescott, and had got it safe to Kingston, where their vessel was sunk, and, as we infer, the stone was inevitably taken out of her in order to her being raised and repaired. The stone was afterwards forwarded to the port of destina-

tion, and, it seems conceded, was received by the consignees. The freight was therefore earned by the plaintiffs if it can be properly held that the forwarding the stone to Prescott was their act, or done by their procurement. It might be that the plaintiffs did not or would not forward them, and that the consignees were obliged to procure their being forwarded at their own expense, in which case these plaintiffs would have had no right to claim the freight from them. It appears that in fact the defendants forwarded the stone to Prescott, but it is not asserted that they did so on any contract with the consignees, or that they have set up any claim against the consignees for the freight from Kingston. They could not pretend to have a claim for more.

In setting up as an answer to the claim for this sum of \$444, that the plaintiffs are entitled to recover the whole freight from the consignees, the defendants in fact assert that the transport from Kingston and the delivery at Prescott were done by them for the benefit of the plaintiffs, operating as a completion of the contract and entitling them to the full freight. And we do not see that as between the plaintiffs and the consignees the former may not adopt this act of the defendants and so recover the whole freight. The language of Lord Ellenboro' in *Hunter v. Prinsep* (10 East, 394) appears to us to establish that the plaintiffs have, upon the facts that appear, a right to claim their whole freight from the consignees. "If the ship be disabled from completing her voyage, the shipowner may still entitle himself to his whole freight, by forwarding the goods by some other means to the place of destination, but he has no right to any freight unless they be so forwarded."

Acting upon this conclusion, we think the plaintiffs have not sustained this particular damage—that is, the loss of any part of the freight from Cleveland to Kingston; and therefore are not entitled to recover it from the defendants, who by the course taken in this cause have precluded themselves from claiming anything for this service rendered, either from the consignees of the stone or the present plaintiffs.

We think the rule should be discharged.

Rule discharged.

FRANCIS EMRICK AND MARGARET HIS WIFE v. LAWRENCE
SULLIVAN.

Husband and Wife—C. S. U. C. ch. 73—Lease by Wife—Amendment.

Land which had been conveyed to a married woman was leased by her alone to the grantor for his life, and the defendant having cut timber upon it she and her husband sued for injury to *their* reversion.

Held, that they could not recover, for the husband was a necessary party to the lease:—that the Consol. Stat. U. C. ch. 73 recognises his estate in her land during coverture, and has made no change in the *conveyance* by married women of their real estate; and even if the lease could have any operation as between the parties to it, it could not establish the plaintiffs' reversion as against a stranger.

The judge at the trial would not amend by converting the action into one of trespass, and the court refused to interfere.

CASE for injury to the plaintiffs' reversion to the east half of lot No. 10 in the second concession of the township of Metcalfe, being in possession of one M'Collum, as tenant to plaintiffs.

Pleas.—1, Not guilty; 2, Denying that the tenant of the land was the plaintiffs' tenant as alleged; 3, That the reversion did not belong to the plaintiffs as alleged; 4, Leave and licence.

The case was tried at London in October last before *Richards, C.J.*

It was admitted that the Crown granted the premises in fee to Arthur M'Collum on the 14th of July 1847; that by deed dated 12th January 1863 Arthur M'Collum, in consideration of \$600, as expressed in the deed, conveyed the same premises to Margaret M'Collum, spinster; and that by Indenture dated 13th January 1863, made between Margaret M'Collum of, etc., spinster, and Arthur M'Collum, after reciting an agreement that Margaret M'Collum would lease the same premises to Arthur M'Collum for the term of his natural life, she granted, demised, leased, and to farm let to Arthur M'Collum, or his assigns, the same premises, *habendum* for the term of his natural life, subject to a yearly rent of ten cents.

The plaintiffs gave evidence that defendant had cut timber on the premises, and among other witnesses called Arthur M'Collum, the tenant for life. Among other things, speaking of the plaintiff Margaret, his daughter, he said on cross-examination, "My daughter married to Francis Emrick three or four years ago, may be five years ago. They were

married unknown to me. They came and showed me their papers. They were married by a Methodist preacher."

At the close of the plaintiffs' case a nonsuit was moved for, on the ground that the lease was made by Margaret M'Collum alone, whereas to be operative it should have been executed by her together with her husband, or by her husband alone, for, according to the evidence, she was a married woman two or three years before the date of the lease to Arthur M'Collum.

Leave was reserved to the defendant to move to enter a nonsuit on this objection, and subject thereto the case went to the jury, who found for the plaintiffs, damages one shilling. Plaintiff applied to amend by converting this into an action for trespass, but it was refused, as the learned Chief Justice thought this a hard action.

Kerr obtained a rule *nisi* to enter a nonsuit on the leave reserved.

M. C. Cameron, Q.C., showed cause, contending that a married woman might demise her land without her husband joining, under the Consol. Stat. U. C. ch. 73. He also referred to *Partridge v. Bere*, 5 B. & Al. 604; *Keech v. Hall*, 1 Doug. 22; and *Hitchman v. Walton*, 4 M. & W. 409, arguing that if the lease to Arthur M'Collum was void as a lease, yet M'Collum was in under it, as much as a mortgagor who has made no default is in as tenant to the mortgagee, and the quasi lessor would therefore have the reversion. He also urged the amendment ought to have been allowed, and should be ordered now.

Kerr, contra, contended that if the lease could operate it left the reversion in the wife alone, and that M'Collum was not the tenant of the two plaintiffs, as averred in the declaration. He referred to *Cotterill v. Hobby*, 4 B. & C. 465; *Martin v. Goble*, 1 Camp. 320, as establishing that M'Collum could not be treated as tenant to the plaintiffs. He also referred to *Martin v. Gilham*, 7 A. & E. 540; and *Kraemer v. Gless*, 10 C. P. 470. As to the amendment, he urged that on the evidence it appeared to be a hard as well as a trifling action, which latter view the verdict of the jury sustained.

DRAPER, C.J., delivered the judgment of the court.

We think this is no case for the exercise of the power of amendment, for if the action were trespass we think it very probable that on the evidence given the jury would not have given greater damages. The learned Chief Justice who tried the case characterized it as a hard action. We are not prepared to dissent from his ruling as to amending.

It has not been disputed that the wife in this case took the estate by force of the deed from her father. Being a married woman at the time, her husband, if there was issue of the marriage, would have an inchoate right as tenant by the curtesy; and the 13th section of the Act appears to us intended to go further, and to recognise that by virtue of the marriage the husband acquired other estates or interests in the wife's real estate, for otherwise the provision that such estate or interest should not be subject to his debts would be useless. During the wife's life his estate or interest as tenant by the curtesy would not be consummate, and could not be made so subject, and therefore we apprehend the statute must refer to the estate he has as being jointly seized with his wife, and in her right, during the coverture of her real estate, and then he is a necessary party to the conveyance of such estate; and at common law the husband alone could lease for a term.

But independently of this suggestion, we are clearly of opinion this statute has not changed the law as to the conveyance by married women of their real estate. It enables a married woman to have, hold, and enjoy her real estate free from the debts and obligations of her husband, but it leaves the law as to the conveying such estate untouched. Except where the statute directly interferes, we apprehend the law as to husband and wife continues as it was before, and even if it could be held that as between the parties to it the deed purporting to convey the life interest to Arthur McCollum had any operation, it is now set up against a stranger to establish the reversion on which the present action is based. We think it is ineffectual for that purpose, and that the rule for nonsuit should be made absolute.

The case of *Doran v. Reid* (13 C. P. 393) may be referred

to on the question of conveyance by husband and wife of the wife's real estate. It collects many of the preceding decisions.

Rule absolute.

THE QUEEN *v.* SAMUEL M'DOWELL.

Death caused in a quarrel—Murder or manslaughter—New trial refused.

P. (the prisoner) and D. (deceased), being brothers, were in the house of the latter, both a little intoxicated. D. struck his wife, and on P. interfering a scuffle began. While it was going on D. asked for the axe, and when they let go P. went out for it and gave it to him, asking what he wanted with it. D. raised it as if to strike P., and they again closed, when the wife hid the axe. While the scuffle was going on D. struck P. twice. On getting up P. kicked him on the side and arm, and then ran across the garden, got over a brush fence into the road, and dared D. three times to come on, saying the last time that he would not go back the same way as he came. D. seized a stick from near the stove, which had been used to poke the fire with, and ran towards P. In trying to cross the fence he fell to his knees, and P. came forward and took the stick out of his hand. He got up, and as he went over the fence P. struck him on the head with it. The wife entreated him to spare her husband, but he struck him a second time, when he fell, and again while on the ground, from which he never rose. P., in answer to the wife, said D. was not killed, and refused to take him in, saying, "Let him lie there till he comes to himself."

Held, that the evidence was sufficient to go to the jury to establish a charge of murder :—that if the death had been caused by the kicks received before leaving the house, the circumstances would have repelled the conclusion of malice ; but that whether what took place at the fence was under a continuance of the heat and passion created by the previous quarrel, was, under the circumstances, a question for the jury. A conviction for murder was therefore upheld, and a new trial refused.

THE prisoner was indicted for that he, on the 2nd day of September 1865, at the township of Nissouri, did feloniously, wilfully, and of his malice aforethought, kill and murder one John M'Dowell.

He was tried at the last assizes for the County of Middlesex before *Richards, C.J.*

The prisoner and deceased were brothers, and lived within two miles of each other. They had been to London with some other persons on the 2nd of September, and returned to deceased's house about seven p.m., and deceased drove his sister to her own house, leaving his wife and the prisoner at his (deceased's) house. Prisoner got his supper at deceased's, and expressed some little impatience for deceased to return, saying he must see him, he wanted to talk with him before he (prisoner) would go home. Deceased soon

came in, and struck his wife on the side of the head, blaming her for letting the cows into a field contrary to his directions. Both prisoner and deceased seemed a little intoxicated. Prisoner said to deceased, "If you strike her again, I will strike you." Deceased said it was none of prisoner's business how often he struck his wife. Prisoner answered it was, for he would not let deceased strike her while he was there. Then they laid hold of each other, and deceased asked for the axe. His wife said she did not know where it was. The two men let go of each other, and prisoner said he knew where the axe was, and took up a candle and went to the milk-house and got it, and gave it to deceased, saying, "There's the axe, what do you want with it?" Deceased wielded the axe as if to hit prisoner, and said, "Go out of this house, for you have abused me and mine many a time, and I will not take it off you any more." They again took hold and threw each other down, and deceased's wife got away the axe, and went out and hid it.

When she came back prisoner was on the deceased, choking him, and she told prisoner she would not let him do it, and pulled him off. Prisoner got up, pulled off his coat, and went outside and squared himself, and asked deceased to come out to fight, and said he was cowardly. Deceased went on to the doorstep and caught hold of prisoner. They grappled, and deceased fell undermost, prisoner on him. Deceased struck prisoner twice on the shoulder. She heard deceased struggling like for breath, and froth coming from his mouth, and said to prisoner, "Sam, you have choked him to death." He said, "No." She pulled prisoner off and laid herself on deceased to protect him. Prisoner got up and kicked deceased once on the side and once on the arm. Deceased said his arm was broken.

Prisoner ran as fast as he could across the garden, got over the fence, and dared deceased to come out—said he was outside the fence, at his defiance—that deceased was cowardly—dared him three times to come, and the last time said, "If you come you will not go back the same way as you came." Deceased jerked himself from his wife and asked where the axe was. She told him she did not know, and he seized a stick

from behind the stove and ran with it in his hand towards prisoner. Deceased had to go over a brush fence, and in trying to do so fell to his knees, and prisoner came forward and took the stick out of deceased's hands. Deceased got up and went over the fence towards prisoner. As he went over prisoner struck him on the head with the stick. Deceased said, "Would you do that to your brother?" Deceased's wife said, "For God's sake spare his life to me." Prisoner said damn him if he would, and hit deceased a second time on the head. Deceased fell, and prisoner after deceased was down struck him a third time. Deceased's wife caught him up and said, "Sam, you have killed him." Prisoner said, "No, damn clear of me, he just deserved all he got." She asked prisoner to stoop down and look at deceased, and said, "Don't you see how the blood is coming out of his nose, he is killed." Prisoner said, "No, he is only felled."

The stick was produced. It had been used for poking the fire in the stove. Deceased's wife asked the prisoner to help her in with the deceased. He said, "No, let him lie there till he comes to himself." Prisoner went with her to the house, and she asked him to sit at the door while she went to turn the cows out of the field, and he said he would. She went to give the alarm, and got one Pollock to go with her to her house. Prisoner came up; he had a stick. She caught hold of it, and he told her to stand back; he was going to take her life. Prisoner saw Pollock, and asked who he was. She said she did not know. Prisoner said he would kill the first man he met. She got away from him and ran home, and found deceased lying in the same place just as she had left him, and the body was not moved till the inquest.

Deceased's wife swore that her husband and prisoner lived on friendly terms as brothers should, except when there was whisky; that deceased had not time to strike with the stick before prisoner took it from him.

Pollock said deceased's wife came to his house to get help. She walked back before him at his desire. He met prisoner, who threw Pollock's cane out of his hand. Pollock

told him he was going to one Judge's. Prisoner said no foot further should he (Pollock) go to-night, and Pollock turned towards his own house. The next morning, between nine and ten, prisoner came to John Kettle's house and said his brother John was dead; that he had a squabble with deceased and struck him two or three times; that he left him all right, and asked, "What shall I do?" Kettle replied, "Stand your ground," and he said he would not leave under any circumstances. From other evidence it appeared that the prisoner and deceased were on good enough terms on their way back from London, but they were "both pretty well on in liquor." The prisoner was told of his brother's death on Sunday morning before he went to Kettle's house.

The medical evidence established that the blows on the head were the cause of death. There were marks of several severe blows on the head and body—a very severe blow on the face from the eye to the chin. It twisted the nose out of place, but did not fracture the bone, and, as the medical witness said, must have been inflicted when falling or on the ground. There was no fracture of the skull, but one or more blood-vessels ruptured. He thought deceased must have died almost immediately.

The learned Chief Justice left to the jury to say—1, whether deceased came to his death by violence; 2, if so, was the violence the act of the prisoner; 3, if so, was it with malice aforethought or not.

They convicted the prisoner.

C. Robinson, Q.C., obtained a rule calling on the Attorney General to show cause why the verdict of guilty should not be set aside and a new trial had, on the ground that the verdict is contrary to law and evidence and the weight of evidence, in this, that the evidence was insufficient to warrant a conviction of murder, and at most proved only the crime of manslaughter; and for misdirection, in not so directing the jury as to the effect of the evidence. He cited *Arch. Crim. Plg.*, ed. 1862, 541, 542; *Russ. C. & M.* 529; *Hale P. C.* vol. i. 453; *Rex v. Rankin*, *Russ. & Ry.* 43; *Rex v. Ayes*, *ib.* 166; *Rex v. Thomas*, 7 *C. & P.* 817; *Re-*

gina *v. Fisher*, 8 C. & P. 182, 186; Regina *v. Eagle*, 2 F. & F. 827, 828, note *b*; Regina *v. Vamplew*, 3 F. & F. 522.

Robert A. Harrison, for the Crown, showed cause.

DRAPER, C.J., delivered the judgment of the court.

The sole question is whether the learned Chief Justice was right in leaving this evidence to the jury as legally sufficient to warrant a conviction for murder. The manner in which he left it is not excepted to.

The prisoner's case is in effect rested on the ground that the evidence showed a violent quarrel, accompanied with actual personal conflict, between the prisoner and the deceased, and that the prisoner in the heat of blood and passion, and without sufficient time to cool, inflicted the blows the cause of death.

It must be borne in mind that in every charge of murder, where the act of killing is proved against the prisoner, "the law presumeth the fact to have been founded in malice until the contrary appeareth" (Foster's Crown Law, 255).

Mere words or provoking actions or gestures expressing contempt or reproach, unaccompanied with an assault upon the person, will not reduce the killing from murder to manslaughter, though if immediately upon such provocation the party provoked had given the other a box on the ear, or had struck him with a stick or other weapon *not likely to kill*, and had unfortunately and contrary to his expectation killed him, it would only be manslaughter.

In the present case the stick used was produced before the jury, and they had, which we have not, the best means of judging, from its size and weight, whether a blow or repeated blows with it would be likely to cause death. If in fact it was a heavy stick—one to be deemed a deadly weapon—the giving repeated blows with it would furnish some evidence of malice. For though there was scuffling and violence between the two at the house, in which the prisoner was struck by deceased, yet after this, and after kicking deceased severely while he was lying on the floor or ground, the prisoner went across the garden, over a brush fence, and off the deceased's premises, and stood daring him to come

out, and threatening him as to what might happen if he did.

If the death of deceased had been caused by the kicks received before the prisoner went away from the house, we think the jury should, and we have no doubt would, have been told there were circumstances sufficient to repel the conclusion of malice. But the scuffle was over. It had not been, as a conflict, unfavourable to the prisoner, and it does not appear that the deceased had shown any desire or intention to follow the prisoner until he was dared to do so. Then he took the stick spoken of, and while getting over the brush fence, which for the moment separated the two, he fell on his knees, when the prisoner took the stick from him, and as deceased was getting over the fence struck him on the head with it. The deceased's wife interposed an entreaty to the prisoner to spare her husband, to which he paid no attention, but struck him again on the head, when deceased fell, and while down the prisoner gave him a third blow.

Ayes' case (Russ. & Ry. 166), which was cited for the prisoner, is distinguishable by the shortness of the interval between the second blow given by the prisoner in that case (a blow clearly given under the influence of passion) and the stamping on the body which caused death. The one appears to have immediately followed the other, while in the present case, after the quarrel at the house, the prisoner had time to run through the garden and cross the brush fence, and to dare the deceased to come out; and moreover, he awaited his coming, and assailed him at a disadvantage as he got near. The only semblance of new provocation was the deceased coming towards him with the stick.

In Rankin's case (Russ. & Ry. 43) the interval between the prisoner's going out after receiving a blow on the throat which "sent him with his heels upwards," and his returning with a pitchfork, with which he inflicted a deadly wound, was "about a minute." The facts sufficiently raised if not a strong at least a reasonable ground for thinking he was under the excited passions of the previous conflicts; and then "doubts were entertained by some of the judges whether the offence was more than manslaughter," and his life was

spared. The reporter puts it as a query whether the killing amounted to murder.

In Royley's case (1 Hale P. C. 453, 12 Co. 87) A., the son of B., and C., the son of D., fell out in a field and fought, and A. being beaten, ran home all bloody to his father, who presently took a staff and ran to the field, three-quarters of a mile distant, and struck C. so that he died; and it was held not to be murder, because done in sudden heat and passion. But in the report of this case in Cro. Jac. 296 the blow is said to have been given with a "little cudgel," and in Godbolt, 182, it is said to have been given with a rod. Mr. Justice Foster (Cr. Law, 295) says he thinks it may be fairly collected from Coke's manner of speaking and Godbolt's report that the accident happened by a single stroke with a cudgel not likely to destroy, and that death did not immediately ensue. He plainly doubts the soundness of the decision on the state of facts stated in Hale (*ub. sup.*), and adds, "I observe that Lord Raymond layeth great stress on this circumstance, that the stroke was with a cudgel not likely to kill," referring to Lord Raymond, 1498.

It has been strongly urged that in this case the prisoner's replies to the deceased's wife after the fatal blows showed that he did not think he had killed deceased, and his apparent ignorance of the event till the following morning strengthens that view. But we cannot sever this from the fact of repeated blows, reducing the deceased to immediate insensibility, the disregard to the wife's appeal to spare her husband, and the indifference to the state of deceased evinced by refusing to help his wife to carry him to the house, nor yet from his conduct when he afterwards met her and Pollock.

There are many authorities which establish that in the case of a sudden quarrel, where the parties immediately fight, there may be circumstances indicating malice in the party killing, which killing will then be murder. In this case we think there are circumstances which the learned Chief Justice could not withhold from the consideration of the jury. If what took place at or near the brush fence was the whole case, no one, we think, can doubt the killing was murder. Whether their immediate sequence upon the pre-

vious quarrel and conflict at the house showed that the latter took place under a continuance of the heat and passion created by the former was the turning-point of the case, and was to be determined by the finding or negating malice ; and this was specially left to the jury on the whole evidence.

We have looked at the cases cited from Foster and Finlayson, but they do not appear to us to affect this case.

We think the case was properly left to the jury by the learned Chief Justice, and that this rule must be discharged.

It seems to us impossible to hold that on a statement of the facts of this matter the prisoner could not be legally convicted of murder. At least by the light of modern authority all questions as to motive, intent, heat of blood, etc. etc., must be left to the jury, and should not be dealt with as propositions of law. See *Regina v. Eagle*, 2 F. & F. 827, and the note thereto.

Rule discharged.*

PARKER v. WATT ET AL.

Covenant to convey—Who to prepare the conveyance.

Declaration.—That defendants covenanted with the plaintiff that on certain conditions specified they would, by a good and sufficient deed in fee-simple, well and sufficiently convey or cause to be conveyed to the plaintiff a certain lot of land, free from encumbrances made or suffered by defendants ; and that although he performed the conditions, yet defendants did not convey, etc., but, on the contrary, they had not a good title, alleging an encumbrance created by defendants. *Plea*, that the agreement declared on witnessed that defendants should convey or cause to be conveyed to the plaintiff at his expense, by a good and sufficient deed, etc. (as in the declaration), and the defendants have always been ready and willing to execute such a conveyance, but he, the plaintiff, never prepared or tendered it for execution.

Held, that the plea formed no answer, for under such a covenant it was defendants' duty to make a conveyance, and offer to deliver it to the plaintiff on payment of expenses.

DECLARATION.—That heretofore, by deed dated the 6th of May 1856, and made between the defendants of the first part and the plaintiff of the second part, the defendants covenanted with the plaintiff that they should and would, on the payment of the sum of £85, and interest thereon, on the days and times in said deed mentioned, and also on the

* The sentence was commuted.

observance and performance of the covenants and conditions in said deed mentioned, by the plaintiff to be paid, observed, and kept, but not otherwise, by a good and sufficient deed in fee-simple well and sufficiently convey or cause to be conveyed to the plaintiff, his heirs and assigns, all and singular, etc. (specifying the land), free from all encumbrances made, suffered, or created by the defendants, or any person claiming by, from, or under them. And the plaintiff avers that although he paid to the defendants the said sum of £85, and interest thereon, on the days and times and in manner mentioned in said deed, and observed and performed the covenants and conditions in said deed mentioned by him to be paid, observed, and kept, and although all conditions were performed and fulfilled, and all things happened and were done, and all times elapsed, necessary to entitle the plaintiff to the performance of the said covenant of the defendants, and to maintain this action for the breach thereof hereinafter alleged, yet the defendants did not, although requested so to do, by a good and sufficient deed well and sufficiently convey or cause to be conveyed to the plaintiff, his heirs and assigns, the said parcel or tract of land free from all encumbrances made, suffered, or created by the defendants, or any person or persons claiming by, from, or under them; but, on the contrary thereof, the defendants had not at the time of the said contract, or at the time of the payment of the said sum of £85 and interest, or at any time before the commencement of this suit or since, a good and sufficient title to the said lands in fee-simple, in this, that one undivided moiety of the said land was during all the time aforesaid, and up to the time of the commencement of this action, vested in one James Webster; and also for that there was before and at the time of the said payment of £85 and interest as aforesaid by the plaintiff, and from thence hitherto till the commencement of this suit, a mortgage encumbrance on said parcel of land, dated the 31st of July 1860, and made and executed by the said defendants to the Honourable Adam Ferguson, in his lifetime, of Woodhill, for the sum of £2240 sterling money of Great Britain, payable on the 1st day of January 1860, with interest at the

rate of six per cent. per annum, payable on the first day of January in each year.

Second Plea.—That the agreement in the declaration mentioned witnessed that for the consideration therein mentioned, and on the performance by the plaintiff of the covenants and conditions therein mentioned, the defendants should well and sufficiently convey or cause to be conveyed to the plaintiff, at his expense, cost, and charges, by a good and sufficient deed in fee-simple, the parcel of land in the declaration mentioned, free from all encumbrances made, suffered, or created by the defendants, or any person claiming under them; and the defendants have always been ready and willing to execute or cause to be executed a conveyance in fee-simple of the said lands to the plaintiff free from all encumbrances as aforesaid, but that the plaintiff did not at any time before the commencement of this suit prepare or cause to be prepared, or tender any such conveyance to them for execution as aforesaid.

Demurrer.—That under the agreement therein declared on it is not the duty of the plaintiff, but of the defendants, to prepare and tender the deed of conveyance. 2. That at all events, under the circumstances set out in the said first count showing defendants' want of title, and which are admitted by the plea, it was not necessary for the plaintiff to prepare and tender any deed of conveyance as a condition precedent to his suing for the breaches complained of. 3. That the defendants, in their said second plea, do not aver or show any readiness or willingness, by a good and sufficient deed, well and sufficiently or effectually to convey, or cause to be conveyed, in accordance with the contract, the said lands free from all encumbrances created by them, nor do they allege or show any ability so to do, but, on the contrary, by their said second plea they admit the allegations in the said first count showing the defendants' want of title and their inability to convey free from all such encumbrances, and the mere fact of the defendants' willingness to execute a form of deed purporting to convey, without really or effectually conveying said land, or being ready and able so to do, is no compliance with the defendants' covenants, and

the said second plea is therefore no defence to the first count.

M. C. Cameron, Q.C., and *Robert A. Harrison*, for the demurrer, cited *Mouck v. Stuart*, 4 U. C. R. 203 ; *M'Donald v. Snitsinger*, 5 U. C. R. 312 ; *Prindle v. M'Can*, 4 U. C. R. 228 ; *Rogers v. Lake*, 9 U. C. R. 264 ; *Smith v. Doan*, 15 U. C. R. 634 ; *Thayer v. Street*, 11 C. P. 243 ; *Scott v. Reikie*, 15 C. P. 200.

Crooks, Q.C., contra, cited *Burns v. Boyd*, 19 U. C. R. 547, 554 ; *Lovelock v. Franklyn*, 8 Q. B. 377 ; *Sug. V. & P.*, 14th ed. 241 ; *Dart. V. & P.* 186, 463.

MORRISON, J., delivered the judgment of the court.

We are of opinion that the plaintiff is entitled to judgment on the demurrer to the second plea.

The principles laid down in the case of *Burns v. Boyd* (19 U. C. R. 554) and in the cases therein cited in our own courts are applicable to the present one—namely, that where the vendor binds himself to convey or to make a good title on a certain day or on a certain event happening, then he must at his peril prepare and make the deed, for he cannot otherwise fulfil his undertaking to convey or to make title.

Here the declaration alleges that the defendants by deed covenanted with the plaintiff that they should and would, on the payment of £85, and interest thereon at the days and times mentioned in the deed, by a good and sufficient deed in fee-simple, well and sufficiently convey or cause to be conveyed to the plaintiff park lot No. 4, etc., free from all encumbrances, etc. ; and the plaintiff avers payment of the £85 and interest to the defendant, on the days, etc., mentioned in the deed, and alleges as a breach that the defendants did not, although requested so to do, by a good and sufficient deed well and sufficiently convey or cause to be conveyed to the plaintiff the land free from all encumbrances, etc.

The defendants plead that the agreement in the declaration mentioned witnessed that for the consideration therein

mentioned, etc., the defendants should well and sufficiently convey or cause to be conveyed to the plaintiff, at his expense, costs, and charges, by a good and sufficient deed in fee-simple, the land mentioned in the declaration, free from all encumbrances, etc., and that the defendants have always been ready and willing to execute or cause to be executed a conveyance in fee-simple of the lands to the plaintiff, free, etc., but that the plaintiff did not at any time before the commencement of this suit make or cause to be prepared or tender any such conveyance to them for execution as aforesaid.

Without giving any opinion upon the objection to the plea or to the allegation of the new matter—namely, that the defendants were to convey to the plaintiff at the expense, etc., of the plaintiff—assuming that the allegation appeared on the face of the declaration, the case of *M'Donald v. Snitsinger* (5 U. C. R. 312) is an authority against the defendants. This court held there that the defendant should have made a conveyance of the land to the plaintiff, and offered to deliver it to the plaintiff on payment of the expenses, and if the plaintiff refused to pay the charges the defendant would have stood acquitted; and so in the present case, assuming the agreement to be as alleged by the defendants, they would have complied with their covenant.

Judgment for plaintiff on demurrer.

SCOTT v. THE NIAGARA DISTRICT MUTUAL INSURANCE CO.

Insurance—Parol waiver of conditions—Pleading—27 and 28 Vict. ch. 38.

To an action on a policy of insurance defendants pleaded non-performance of a condition requiring the delivery of a particular account of the plaintiff's loss, verified by his oath or affirmation and by his books of account, within thirty days after the loss. The plaintiff replied *de injuriâ*, and at the trial relied upon a parol waiver of this condition by the defendants' managing director and secretary.

Quære, whether evidence of such waiver was admissible, not being specially replied; but

Held, that if replied it would have been no answer to the plea, for it would have been setting up a substituted parol contract in answer to the sealed policy;—and a nonsuit was therefore ordered.

The 27 and 28 Vict. ch. 38, gives no authority to the directors to waive by parol the performance of a condition precedent, still less to the managing director and secretary. *Quære*, as to the effect of that statute.

ACTION upon a policy of insurance against fire, made by

defendants in favour of plaintiff, on a general stock of dry goods, groceries, hardware, boots and shoes, and crockery, in a frame store in the village of Wingham, in the sum of \$1600 for one year, commencing at noon on the 7th of January 1864, and ending at noon the 7th of January 1865. *Averment*, that the plaintiff was always interested in the stock until, etc.; that while the policy was in force the stock was destroyed by fire; and that the plaintiff hath sustained damage to the full amount insured, yet the plaintiff has not been paid.

Pleas.—1. *Non est factum*.

2. Sets forth a condition that all persons insured and sustaining loss are to give notice to the company forthwith, and within thirty days after the loss to deliver a particular account thereof, signed by their own hand and verified by their oath or affirmation, and by their books of account or other vouchers, and are to declare on oath whether any other insurance or encumbrance has been made on the property; and that if there be fraud or false swearing the claimant shall forfeit all claims under the policy. *Averment*, that the plaintiff did not give immediate notice, and within thirty days, etc.—negating the observance in the words of the condition.

3. That defendants were induced to make the policy by the fraudulent misrepresentation of the plaintiff, in his application on which the policy was issued, that the said general stock was of the value of \$3000, whereas it was only worth \$2000.

The plaintiff joined issue on the first and third pleas, and replied *de injuriâ* to the second.

The trial took place at Hamilton, in November 1865, before *Morrison, J.*

Upon the evidence two questions arose, which were submitted to the jury: 1st, Whether there was any fraudulent misrepresentation made by the plaintiff as to the extent and value of his stock at the time of making the policy, or of his loss by the fire; and, 2nd, Whether the defendants had waived the plaintiff's compliance with the condition set out in the second plea, that he would deliver a particular

account of his loss, verified by oath and by his books of account.

Upon the first point the evidence was sufficient to sustain the plaintiff's case, though not by any means conclusive in his favour. The plaintiff proved that on the 14th of November 1864 he gave a notice of his loss to the defendants, in which he stated that his store and goods were completely destroyed by fire; that "it being an exceedingly windy and stormy night, everything was destroyed, including a large amount of money."

On the second point, the evidence was to the following effect: The plaintiff was indebted to Messrs. Young, Law, & Co., of the City of Hamilton, and on the 19th of November 1864, after the fire (which occurred on the 9th of November 1864), he went with one Pringle, a clerk of that firm, to the head office of the company at St. Catherines, and saw the manager of the company (Mr. Graydon) and Ross, the secretary. Pringle produced an affidavit of the plaintiff, sworn on the 15th of November, relative to the fire and loss, stating that he was absent from home when the fire happened, and on his return found that his store and the contents had been burnt, as also "a portion of his books of account," and a sum of money exceeding \$600. Pringle had also with him the policy and an assignment thereof to Young, Law, & Co., dated 15th November 1865, and stated that he was acting for that firm. He said that Mr. Graydon read the affidavit, and said it was quite satisfactory, and that he asked Mr. Graydon if there was anything else to make it satisfactory, and he said all wanted was an order from the plaintiff to get the money, and said distinctly that no other proof was necessary; and that Ross gave the same assurance.

In February Pringle, through a letter written by Mr. Graydon, was made aware that the papers were not satisfactory. He stated that he got a further statement from the plaintiff, made out from invoices and his books, by taking his total invoices and total sales, which statement was sent to defendants on the 29th of March 1865. Upon this Mr. Graydon went to Young, Law, & Co., and he demanded the

books; for it appeared that only one book, a blotter a few weeks old, had been destroyed at the fire. This, as Pringle stated, was the first time the books had been demanded. In consequence, the plaintiff went with Pringle, a day or two after, to the defendants' manager, and produced the books and statements. He (Mr. Graydon) looked at them, and said it would take the accountant some time to examine them; he pointed out some items that were not properly carried out. He said Mr. Graydon did not ask to have the books left with him.

There was a long correspondence put in between Young, Law, & Co., and Mr. Graydon, the former pressing for payment, the latter making objections to the proofs, but offering \$1000, though denying liability.

Mr. Graydon, for the defence, stated that when he went to Young, Law, & Co.'s office, one of that firm told him that the plaintiff refused to produce his books; that afterwards he saw Pringle, who produced some books, and that he saw that some of the accounts were not added up or carried out; and seeing that, he said it would be impossible for him to examine the statement there with the books at that time, as it would require an actuary to do it, and he asked them to leave the books, which they (plaintiff and Pringle) refused to do. He said that he made a verbal report to the directors of this interview, stating that the books were unsatisfactory. He said that when Pringle first brought him the plaintiff's affidavit he did tell him that he supposed all was satisfactory, and it would be brought before the directors, and he presumed, as it came from Young, Law, & Co., it would be all right; and he told Pringle that it would be necessary that they should have an order from the plaintiff, and that was all that was necessary to be had; but he also said he expected further accounts from the plaintiff.

At the close of the plaintiff's case a nonsuit was moved for, as there was no proof that the plaintiff had delivered a particular account of his loss, verified by his books of account, within the thirty days, it appearing that he had his books, and that the notice he gave, as well as his statement, was incorrect and untrue as to the loss of his books. It was

answered, that although the plaintiff might not have complied with this condition, the defendants had waived it; to which it was objected that there should have been a replication asserting such waiver in answer to the second plea, and that the pleadings as they stood did not raise the question. And leave was reserved to the defendants to move to enter a nonsuit on this objection.

At the close of the whole case the learned judge left to the jury to say, on the second issue, whether the defendants waived the necessity of the plaintiff delivering any further statement of his loss verified by his books, etc., other than that which was proved to have been sent in to defendants; and on the third issue to say whether the plaintiff fraudulently represented the value of his goods at \$3000:—that if they found no fraud in the representations, and that defendants waived the delivery of a further statement of loss, to find for the plaintiff; if they found there was fraud, or that there was no waiver, to find for the defendants.

They gave a verdict for the plaintiff.

James Miller obtained a rule, calling on the plaintiff to show cause why a nonsuit should not be entered pursuant to the leave reserved, or why a new trial should not be had without costs, the verdict being against law and evidence, and the damages being excessive.

Burton, Q.C., showed cause. He referred to *Pim v. Reid*, 6 M. & G. 1, as being in point, and cited *Lampkin v. Ontario, etc., Insurance Co.*, 12 U. C. R. 578, and *Merritt v. These same defendants*, 18 U. C. R. 529. He argued that the statute 27 and 28 Vict. ch. 38, gave the directors authority to waive.

Miller, contra, cited *Mason v. Harvey*, 8 Ex. 819; *McKenzie v. Vansickles*, 17 U. C. R. 226; *CinqMars v. Equitable Assurance Co.*, 15 U. C. R. 143, 246; *Lampkin v. Western Assurance Co.*, 13 U. C. R. 242; *Mann v. Western Assurance Co.*, 17 U. C. R. 190, and 19 U. C. R. 314; *Lewis v. Niagara District Mutual Assurance Co.*, 12 C. P. 123.

DRAPER, C.J., delivered the judgment of the court.

It seems to have been conceded at the trial that that part

of the condition which forms the base of the defence set up by the second plea—namely, the delivery of a particular account of the plaintiff's loss, verified by his oath or affirmation and by his books of account, within thirty days after the loss—was not complied with by the plaintiff. But it was attempted to supply the omission by proof that an affidavit of the plaintiff, containing a statement of his loss in general terms, "that his store and its contents, consisting of dry goods, groceries, hardware, boots and shoes, and crockery had been entirely consumed on the night of Wednesday, the 9th inst., as also a portion of my books of account," had been delivered to the managing director and the secretary of the defendants at their head office, and that both these officers stated that no other proof was necessary; and on the motion for nonsuit, which was renewed this term when the rule *nisi* was granted, the question arose whether on the pleadings it was open to the plaintiff to rely on a waiver of this condition. The learned judge, for the purposes of the trial, refused to nonsuit, and left the question of waiver to the jury.

It has been argued before us, 1st, on the authority of the corporation to waive such a condition, or at all events by parol; 2nd, on the authority of the managing director and secretary to bind the corporation by a parol waiver; and also on the admissibility of evidence of waiver upon these pleadings.

Upon the last question no direct authority was cited except *Pim v. Reid*; but in that case there was no decision of the court upon the ruling of *Tindal, C.J.*, who had, upon a formal traverse of an allegation that the plaintiff delivered a particular account of the loss according to a condition in the policy, ruled that the plaintiff might prove a dispensation with the obligation to deliver.

But the recent case of *The Thames Ironworks Co. v. The Royal Mail Steam Packet Co.* (8 Jur. N. S. 100, and 13 C. B. N. S. 358) appears to us to have an important bearing on the question. There the action was on a sealed contract to build two vessels according to specification, with a stipulation that if during the building any alteration should be required

by the defendants' surveyor, the plaintiffs should not make such alterations unless on the authority of a letter signed by defendants' secretary, stating that such alterations had been directed by the court of directors of defendants' company.

The first count averred performance by the plaintiffs, and non-payment by the defendants. The sixth count stated that the defendants required divers alterations, which they made; that defendants discharged them from the stipulation in the agreement that such alterations should not be made except on the authority of a letter, etc., and claimed to be paid for such alterations. To which sixth count the defendants, among other things, pleaded, as to the claim for alterations, that the agreement in the first count was the deed both of plaintiffs and defendants; that there was no other contract relative to the alterations; that the discharge alleged in the sixth count was not by deed; and that the plaintiffs' claim for the alterations is founded on the said deed. Plaintiffs replied, equitably, that defendants, by parol, and without a letter signed by the secretary, directed the alterations, and plaintiffs made them at defendants' request, and defendants afterwards took the ship and enjoyed the benefit of the alterations; that nothing remained to be done by the plaintiffs; that they were in equity discharged from the stipulation, and the defendants ought not to be allowed to set up the want of a discharge thereof by deed in bar of the plaintiffs' claim. On demurrer the replication was held bad; and the opinion of the judges is, that putting the replication and the declaration together, the plaintiffs could not support an action at common law.

The alleged dispensation with the condition precedent is treated as the setting up a new contract by parol; and we can see no difference in this case, if the plaintiff had replied to the plea that the defendants dispensed with or waived (which is only another term for the same thing) the production of the books, or the delivery of a particular account.

But if the plaintiff could not have replied the waiver, we do not see on what ground he can give evidence of it in support of his traverse of the defendants' allegation that he did not produce his books, etc. A matter which if

pleaded and the facts admitted would not displace the plea, cannot by being proved without pleading have a greater effect. In either case the action fails. But we see no foundation for admitting evidence which in effect contradicts the declaration by setting up a substituted contract.

Here the original contract was under seal. A subsequent parol contract could not be pleaded in bar of it. See *Spence v. Healey* (8 Ex. 668), *Smith v. Trowsdale* (3 E. & B. 83). Upon what principle can the plaintiff endeavour to enforce it, and at the same time vary it by parol, in a matter introduced for the benefit of the defendants, and to be performed by him.

On this ground we think the rule for nonsuit should be made absolute. We should notice, however, that we do not find in the statute 27 and 28 Vict. ch. 38, any authority given to the directors to waive by parol the performance of a condition precedent, and still less by the managing director and secretary, nor indeed to waive at all. It might be held that under the authority of ch. 52, Consol. Stat. U. C. sec. 62, they can make by-laws, rules, and regulations, and by instrument under seal, made according to such rules, etc., alter or rescind a contract they had made, by consent of the other party, provided they did not attempt to dispense with anything positively negated by the statute, which is their charter of incorporation. The observations of *Sir J. B. Robinson, C.J.*, in *Merritt v. These defendants* are well worthy of attention (18 U. C. R. 529); and the case of *Lampkin v. The Western Assurance Co.* (13 U. C. R. 242) sustains the rejection of the evidence.

Rule absolute.

GREAVES v. THE NIAGARA DISTRICT MUTUAL FIRE
INSURANCE COMPANY.

Insurance—Condition requiring a particular account of the loss—Non-compliance with.

By a condition of the policy sued upon, persons insured were bound, within thirty days after a loss, “to deliver in a particular account of such loss or damage, signed by their own hand, and verified by their oath or affirmation, and by their books of account and other proper vouchers.”

The plaintiff sent in his affidavit, stating generally the value of the goods saved and destroyed; a certificate of the Reeve, as the nearest magistrate, as to his inquiry into and belief with regard to the fire being accidental; and of two merchants; and a book containing a statement of the goods lost, made up partly from invoices and partly from recollection, but not verified by his account books or other vouchers, which he had but did not produce, nor by his affidavit.

Held, clearly no compliance with the condition.

ACTION on an ordinary policy of insurance, in which the plaintiff claimed \$1500.

The defendants pleaded: 1. *Non est factum*.

2. That the plaintiff did not within thirty days after the loss deliver in a particular account of said loss, and verify the same by his books of account and other proper vouchers.

3. That the drugs, groceries, stationery, and books were not burned as alleged.

The case was tried at Barrie, before *Morrison, J.*, in October 1865.

The plaintiff put in the policy (which was admitted) bearing date 7th December 1863, insuring \$1500 on a general stock of drugs, groceries, stationery, and books in Collingwood, as described in his application, for three years, from the 7th December 1863 to noon of the 7th December 1866.

Among the conditions to which the policy was subject was the following: “All persons insured with this Company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the Company, and within thirty days after said loss to deliver in a particular account of such loss or damage, signed by their own hand and verified by their oath or affirmation, and by their books of account and other proper vouchers. They shall also declare on oath whether any and what other insurance or encumbrance has been made on the same property. If there be any fraud or false

swearing, the claimant shall forfeit all claims by virtue of this policy."

The fire took place on the 1st of February 1865. The plaintiff called the defendants' secretary, who swore that on the 13th of February a packet came by post to defendants. It contained (all attached together), 1st, an affidavit of the plaintiff, stating that about 15 minutes to 2 on the morning of the 1st of February (1865) a fire broke out in the rear of his store, by which his premises were entirely consumed, and that goods contained in the said premises and insured with defendants for \$1500 were of the value of \$4400, 88c.; that goods to the amount of \$2143, 83c., as per invoice, were saved from the fire, leaving a balance of loss by the fire amounting to \$2257, 65c., to which add, as per estimate attached, ten per cent. of a depreciation on the goods saved, say \$2014, 38c., and for goods rendered unsaleable \$60—in all \$2541, 43c.; that there was a further sum of \$500 insured in the Western Assurance Company of Toronto on the goods contained in the two front buildings, effected on the 8th of February 1862; that a part of the second or westerly store was occupied by Edward Florance as a shoemaker's shop; that the origin of the fire, so far as could be learned, and to the best of his knowledge and belief, was accidental.

2. A certificate, dated 11th February 1865, of two merchants resident in Collingwood, that they had examined the goods saved from the fire in the plaintiff's premises; that they find there were of these goods to the amount of \$60 rendered unsaleable; and that the depreciation on goods saved is ten per cent. on the amount, say \$2143, 83c.; amount of invoice as exhibited to them \$214, 38c.

3. A certificate from the Reeve of Collingwood that he lives contiguous to the premises destroyed; is in no way concerned in the loss; has examined the circumstances attending the fire; is well acquainted with the character and circumstances of the plaintiff, whose premises were consumed and his stock of goods partially so by fire; and verily believes that the plaintiff by misfortune, and without fraud or evil practice, sustained loss and damage on his goods to the amount of \$2531, 43c., as shown per invoice.

The witness stated that he got no other paper until the 23rd of February, when the plaintiff, in answer to an inquiry if he had a list of his stock and the goods produced, handed the witness a book, which he said contained an account of his stock before the fire, and the amount lost, and said that book was the only one he had, and that he had not taken stock for eight years. The witness asked the plaintiff if he had any other book, and he said not; and as he expressed himself as unsatisfied, the plaintiff told him that the statement was made up by supposing that each room contained certain goods before the fire, and after the fire they supposed that so much was burnt in each room, and in that way he and his clerk made out the accounts in the book; and plaintiff said that the account was not correct, but it was as near as he could come to at that time.

Another witness proved the making up of this book, saying that a statement was made of all the goods saved first, and then a statement was made by the plaintiff and his clerk from their recollection as to what the particular rooms contained. Copies were made, to be sent, as the witness supposed, to the defendants and the Western Assurance Company.

The clerk swore that they weighed and measured all the goods saved; that they referred to as many invoices as they had at the time. In estimating the loss they took each room, and from memory made out the statement. He had a good recollection of what was there. He did not know for certain what would be in boxes, but he gave a statement as near as he could from memory. In some cases, as in the front room, they lumped the amount; they said \$300, which he thought was below the amount. Prices were ascertained, some from invoices, some from memory. He said that the plaintiff had a book containing the goods received from merchants and the amounts he paid them on account. He was there a year before the fire, during which no stock was taken. Plaintiff kept a day book, a cash book, and a ledger. He had another large book, which the witness called the ledger, in which they entered accounts of customers dealing on credit, and the plaintiff at the time of the trial had the

ledger, cash, and day book. The ledger also contained the merchants' accounts and the money paid them.

Robert Connor, the agent of the defendants, swore that on being informed by defendants that they had notice of the fire he went to the plaintiff, who told him he was not prepared to make out his statement, and would not be ready for some time. About three weeks after this the witness received some papers from the plaintiff through the post office, and he forwarded them to the defendants. He opened the package. He said, "I am not positive that any list of the stock was among them. I hurriedly enclosed whatever was in the envelope, but there was no such list to my knowledge like the paper shown to me," but he thought it contained more papers than the three produced by the first witness. On cross-examination he said, "I have no recollection of seeing any other paper but the affidavits, and no recollection of any detailed statement being enclosed to him."

Mr. Ross, the first witness, was recalled, and swore he got no other statement than the little book produced. He first asked the plaintiff, "Where are your books?" and the plaintiff went to his house and produced this book. He was not aware that the plaintiff brought any papers or other books with him at the time.

On this evidence, which was all that related to the plaintiff complying with the condition above set forth, a nonsuit was moved for, because it did not show that he delivered a particular account of the loss, etc., verified, etc., it being in proof that he had his books in his possession. After discussion it was agreed the case should go to the jury as to the damages, and leave was reserved to the defendants to move to enter a nonsuit, on the objection that there was no evidence that the plaintiff had complied with this condition.

And the jury found for the plaintiff, damages \$1200.

James Miller obtained a rule calling on the plaintiff to show cause why a nonsuit should not be entered pursuant to leave reserved.

D. B. Read, Q.C., showed cause. The only case referred to was *Cameron v. The Monarch Assurance Co.*, 7 C. P. 212.

DRAPER, C.J., delivered the judgment of the court.

The inattention of parties whose property is insured to comply with the plain terms of conditions indorsed on the policy, in reference to notice or proof of loss after the injury or destruction of their property by fire, has often given great anxiety and trouble to the courts, especially where on the trial every other part of the plaintiff's case appeared to be well sustained. And sometimes the character of the defences raised to actions on fire policies has been such as to create just regret that a careless omission on the plaintiff's part has enabled the defendants to defeat a claim apparently honest and good in all other respects. Sometimes, however, the character of the claims, at others the allegations of the defence, forcibly impress the court with the conviction that there is an entire absence of that *uberrima fides* which should form part of all these contracts of assurance. Whatever the cause may be, it cannot escape notice that very few defences which are submitted to juries are successful, and it may be that there is a popular impression that the tendency of some Assurance Companies is to question the good faith of claims made upon them more frequently than the occasions warrant.

Nevertheless, they stand before the courts on the same footing as all other suitors, and have the same rights to insist on the performance of conditions precedent on the part of those who prefer claims against them, as such claimants have to enforce the contract of indemnity; and in the present case a question of that character is presented for our judgment.

The condition is already set out, and the second plea is that the plaintiff did not within thirty days after said loss deliver in a particular account of said loss, and verify the same by his books of account and other proper vouchers, according to the said conditions in that behalf indorsed on the policy and set out in the declaration (which states the condition *in hæc verba*). Issue was joined on this plea, and it rested with the plaintiff to prove the affirmative.

There are only two witnesses whose evidence bears upon the question. One of them is Mr. John Ross, who was at

that time secretary of the defendants; the other Mr. Robert Connor, the defendants' agent. The first states the receipt of a letter which contained an affidavit of the plaintiff, to which was attached another affidavit as to the value of goods saved, and of the injury they had sustained, and a certificate of the Reeve, as the nearest magistrate, as to his inquiry into and belief with regard to the fire being accidental, and of the plaintiff's loss. Mr. Ross swears no other list or statement of the goods lost was ever communicated to him, except a book, which was handed to him by the plaintiff, within the thirty days, as a list of his stock and the goods destroyed by the fire. Mr. Connor swears that about three weeks after the fire he received a package from the plaintiff and opened it, and "hurriedly enclosed whatever was in the envelope, but there was no such list to his knowledge like the paper shown" to him, but he thought that it (the envelope) contained more papers than were produced attached together by Mr. Ross. And he said he had no recollection of seeing any papers but the affidavits, etc.—no recollection of any detailed statement being enclosed to him.

Hence it appears, that except the papers produced by Mr. Ross, and this book, also produced by him, which he received from the plaintiff, there is no evidence at all of complying with the condition. The first-mentioned papers are clearly no compliance with it; for, independent of any other reason, they contain no "particular account" of the loss or damage, but are of the most general character, and the evidence showed that the plaintiff did not rely on these papers as being any fulfilment of the condition.

The manner in which the book was made up appears in the evidence. As a list, it cannot be denied that it required verification; for if founded in part on invoices, it rested also on mere recollection, and that principally of a clerk who had been in the plaintiff's employ not much more than a year before the fire, during which stock had not been taken. If this book be adopted as a "particular account," it is neither verified by the plaintiff's books of account nor other proper vouchers. He had books, and some invoices at least, but none were produced to sustain the book or list;

nor is it verified by the plaintiff's affidavit, though this forms no part of the plea.

We cannot hold that upon this state of facts there was any evidence of compliance with the conditions, in letter or substance, as to the verification of the list or particular account.

We think, therefore, the rule must be made absolute.

Rule absolute.

EDWARD M'KAY v. SAMUEL M'KAY, BY THOMAS M'KAY,
HIS GUARDIAN.

Ejectment—Title acquired after suit—Estoppel.

The plaintiff brought ejectment on the 6th of September 1865, claiming under a mortgage from W., the then defendant, in whose place M. was allowed to defend as landlord, claiming under a mortgage from W. to M'I. assigned to him. The mortgage to M'I. was given on the 9th of November 1861, and that to the plaintiff on the 21st of March 1864. On the 21st of September 1865 M'I., by deed reciting an interlocutory decree in Chancery in respect of the foreclosure of W.'s mortgage to him, conveyed to M. as W.'s appointee, and on the 9th of November 1865, by a decree in the same suit, this mortgage was finally foreclosed. It was contended that the mortgage to M'I. had merged in the inheritance and could not be set up against the plaintiff, but

Held, that if it were so the plaintiff could not recover, for when he brought his action he was barred by the mortgage, and he could not avail himself of what took place afterwards.

It was proved that the defendant, in April or May 1865, asserted that he had got a deed of the equity of redemption from W. *Held*, however, that this might refer to the equity as created by the second mortgage, and that the defendant was not estopped from denying W.'s title to mortgage in fee in 1864.

EJECTMENT for the south half of lot number one in the ninth concession of West Flamborough. The writ was addressed to James Wardrop, and was tested the 6th of September 1865. Defence for the whole.

The plaintiff gave notice of title as ultimate assignee of the grantee of the Crown, and under a mortgage made on the 21st of March 1864 between the defendant and the plaintiff, the notice being addressed to Wardrop as defendant.

The now defendant gave notice that he was in possession by Wardrop as his tenant, and claimed title under a mortgage from Wardrop to Donald M'Innes, dated about the 9th of November 1861, and assigned to him (defendant), and default of payment.

The case was tried at Hamilton, in November 1865, before *Morrison, J.*

The plaintiff proved a mortgage, dated 21st March 1864, of the premises, made by James Wardrop to the plaintiff, and that Wardrop was in possession at the date of this mortgage and still is. The plaintiff also proved the service of a notice calling upon the defendant to produce a deed, dated 12th May 1865, from James Wardrop to the defendant Samuel M'Kay of the premises in question, and also the mortgage from Wardrop to M'Innes, referred to in the defendant's notice of title, and the assignment of that mortgage to the defendant, and all leases from defendant to Wardrop. The plaintiff then called upon defendant to produce the deed and mortgage mentioned in the notice. The defendant did not produce them.

A witness then proved that in April or May last the defendant and he had got a deed of the equity of redemption of the lot in question, in order to bar some proceedings taken by the plaintiff against the property. The defendant then put in a mortgage, dated 9th November 1861, from Wardrop to Donald M'Innes, of these premises, conditioned to pay certain notes now overdue. Registered 12th Nov. 1861.

The plaintiff further proved that there was money due on the mortgage to himself. This was his case.

The defendant moved for a nonsuit, on the ground that he had shown the title out of the plaintiff. The plaintiff consented, provided leave were reserved to him to enter a verdict for him on the evidence. The defendant would not agree to this reservation, and went into his defence.

He proved the execution by M'Innes of an indenture dated 27th September 1865, reciting that by a decree in Chancery, dated 24th September 1863, and made in a cause in which he (M'Innes) was the plaintiff, and James Wardrop the defendant, in respect of the foreclosure of a mortgage made by said Wardrop to said M'Innes upon the premises in question in this ejectment, that a reference to the Master was ordered, and that upon Wardrop paying to M'Innes whatever should be found due, that M'Innes should convey the premises to him, or to whom he should appoint; and

further reciting that Wardrop appointed the said mortgage and all other the premises to be assigned to the now defendants—it was witnessed that M'Innes assigned, transferred, and set over to the defendant Samuel M'Kay the said indenture of mortgage, and the lands and premises thereby conveyed, in fee.

The defendant then put in a final order of foreclosure in the Chancery suit against Wardrop, dated 9th November 1865.

On this the learned judge directed a verdict for the defendants, with leave to the plaintiff to move to enter a verdict for him.

Edward Martin obtained a rule calling on the defendants to show cause why the verdict should not be entered for the plaintiff, contending that on the facts proved the mortgage made by Wardrop to M'Innes had merged in the inheritance, and could not be set up as a bar to the plaintiff's recovery; or that a verdict should be entered that the plaintiff was entitled to possession at the time of bringing this action, and for the costs of suit. He cited *Doe Mathewson v. Ault*, 2 U. C. R. 31; *Doe Pearson v. Roe*, 6 Bing. 613; *Doe Parsley v. Day*, 2 Q. B. 147; *Ashford v. M'Naughten*, 11 U. C. R. 180; *Ogilvie v. M'Rory*, 15 C. P. 557; *Goodeve v. Wallace*, 24 U. C. R. 33; *James v. M'Gibney*, 24 U. C. R. 155.

Richard Martin showed cause, and cited *Doe Ogle v. Vickers*, 4 A. & E. 782; *Doe Hurst v. Clifton*, 4 A. & E. 813; *Ford v. Jones*, 12 C. P. 358; *Coote on Mortgages*, 394; *Fisher on Mortgages*, 443; *Adams on Ejectment*, 28, 34, 264.

DRAPER, C.J., delivered the judgment of the court.

The first mortgage was given to M'Innes, and bears date 9th November 1861. It conveyed the legal estate in fee to him.

On the 5th of September 1865 the plaintiff brought this action upon a mortgage of the same premises, made by the same mortgagor as the first mortgage, who was still in

possession. This mortgage was dated on the 21st March 1864.

On the 27th of September 1865 the defendant took an assignment of this mortgage of the 9th of November 1861, and of the lands, etc., from M'Innes, who, it is recited in that deed, had instituted a foreclosure suit against Wardrop on the mortgage, and had obtained an interlocutory decree on the 24th of September 1863, and who, having been paid off by the defendant, made this conveyance under the authority of a deed of appointment executed by Wardrop, the mortgagor. On the 9th of October 1865 the mortgagor was finally foreclosed.

The order admitting the present defendant to appear as landlord is on the face of the record stated to have been made so as to enable the defendant to appear on the 16th of October 1865.

The plaintiff contends that the mortgage of 1861 is merged in the inheritance, and hence that he has a right to recover in this suit upon the mortgage of March 1864.

As we read the ejectment Act, the plaintiff must show a right to the possession in himself on the day when he sues out the summons in ejectment, *i.e.* the 5th of September 1865; and as against Wardrop, then tenant in possession, he would have been entitled to succeed on the ground of estoppel. But Wardrop is now no party to this record, and unless the present defendant is so connected with Wardrop that what would estop the one will equally bind the other, the plaintiff fails.

But the whole evidence being before us, we do not perceive that the defendant, who has since this action was brought taken an assignment of the mortgage of 1861, is estopped from denying that Wardrop had a title in 1864 to make a mortgage in fee. The defendant's assertion in April or May 1865 that he got a deed of the equity of redemption of these premises from Wardrop does not necessarily refer to the equity as created by the second mortgage; it may at least as forcibly apply to the first, respecting which a suit of foreclosure had been already brought; and

the rule is not rested upon this footing, but on that of merger.

Whether the defendant should, in view of all the circumstances, have been allowed to appear *alone*, is not now a question before us. The plaintiff has acquiesced in it, and the action is no longer one against Wardrop. Now on the day of the commencement thereof, the first mortgage was a bar to the plaintiff's recovery, for it showed the legal estate to have been out of Wardrop since November 1861, and the proceedings since then, whatever their effect at law or in equity, cannot alter the state of facts on that day. Admitting, for argument's sake, though not otherwise, that on the 27th of September, or on the 9th of October 1865, the plaintiff's title at law was made good, either under the conveyance from M'Innes or the final decree, the plaintiff should have waited till one or other of those days before he brought his action. A plaintiff cannot first commence a suit in ejectment and then obtain a title to support it, or take advantage of the subsequent dealings of other parties for that purpose. We do not understand that a retroactive effect can be given by us to this alleged merger.

We think the rule must be discharged.

Rule discharged.

FITZGIBBON v. THE CORPORATION OF THE CITY OF TORONTO.

Highway—Dedication—Ejectment.

D. being owner in fee of the land in question, on the 17th of November 1825 conveyed it in fee to F., a married woman. It continued to be fenced in with other land belonging to D. until 1841, when he removed the fence, throwing this land into Brock Street, in the City of Toronto, on which it had abutted, and it continued from that time to be used as part of the street. F. died in 1841, whether before or after the removal of the fence was not certain, leaving her husband and eldest son, who was then of age. The husband died in 1864, and the son in that year brought ejectment against the corporation of the city.

Held, that he was entitled to recover, for the dedication by D., being after the conveyance by him, could pass no title to defendants.

Whether the public generally, not these defendants in particular, had acquired a right of way over the land was a question not affected by this decision.

EJECTMENT for part of Brock Street, in the City of

Toronto, extending one hundred feet south from Queen Street, the full width of Brock Street.

The plaintiff claimed by descent from Mary Fitzgibbon, who was the wife of James Fitzgibbon, formerly Assistant Adjutant-General of Militia in the Province of Upper Canada. The defendants claimed by length of possession.

The case came on for trial at the assizes held in Toronto, for the United Counties of York and Peel, on the 10th of April 1865, before *Richards, C.J.*, when a verdict was entered for the plaintiff by consent, subject to the opinion of the court on the following facts stated and agreed to by counsel for both parties :—

CASE.

1. The *locus in quo* was, on the 17th of November 1825, in the occupation of the Hon. J. H. Dunn, who was the owner in fee, and on that day made a deed of the same in fee to Mrs. Fitzgibbon, the wife of Col. Fitzgibbon.

2. Mr. Dunn continued in the actual possession and occupation of the *locus*, notwithstanding the above deed, until the year 1841, when he removed the fences on the west side of his property, including the *locus*, to the eastern limit of the present Brock Street, which was then opened, and has continued so opened and travelled ever since.

3. Mrs. Fitzgibbon died intestate in March 1841, leaving Charles Fitzgibbon, her eldest son and heir-at-law. He was of age at her death.

4. Col. Fitzgibbon remained in Canada some years after his wife's death, and then went to England, where he died in 1864.

5. Charles Fitzgibbon died in 1865, having first brought this action to recover the *locus*. The plaintiff is his devisee in fee, and has revived the action.

6. Mrs. Fitzgibbon, her husband, and Charles Fitzgibbon resided from 1825 until Mrs. Fitzgibbon's death on a lot of land, the eastern limit of which is the present boundary westward of Brock Street; and Col. Fitzgibbon and Charles Fitzgibbon continued to reside there until 1847.

7. Mr. Dunn dedicated the *locus* as part of Brock Street, as far as such dedication was in his power, by moving back his fences to the present eastern line of Brock Street in the end of 1840 or beginning of 1841.

8. A plan of John Tully, showing in red the land in the

deed of November 1825, and the position of Brock Street, put in as a correct survey of the ground.

The case was argued in Easter Term last.

C. S. Patterson, for the plaintiff, cited *Ketchum v. Mighton*, 14 U. C. R. 99; *Wood v. Veal*, 5 B. & Al. 454; *Baxter v. Taylor*, 1 N. & M. 11; *Regina v. Wismer*, 6 U. C. R. 293; *Regina v. Petrie*, 4 E. & B. 737; *Rex v. Inhabitants of Edmonton*, 1 Moo. & Rob. 24.

J. H. Cameron, Q.C., M'Bride with him, cited *Consol. Stat. U. C. ch. 54*, secs. 313, 336; *Belford v. Haynes*, 7 U. C. R. 464; *Regina v. Spence*, 11 U. C. R. 31; *Regina v. East Mark*, 11 Q. B. 877.

DRAPER, C.J., delivered the judgment of the court.

The facts of this special case are few.

On the 17th of November 1825 the Hon. J. H. Dunn was owner in fee in possession of the piece of land which is in question in this action.

On that day he conveyed the same in fee to Mrs. Fitzgibbon, then wife of Col. Fitzgibbon.

At that time this land was fenced in with other adjoining land which belonged to Mr. Dunn, and he continued to possess the whole until the year 1841. He then removed the fences which formed the western boundary of his property, including the land in question, to the eastern limit of Brock Street as it now is, which street was open at that time, and has continued so opened, and has been travelled ever since.

Mrs. Fitzgibbon died intestate in March 1841, leaving her husband and her eldest son and heir-at-law, Charles, her surviving. Up to the time of her death she had lived with her husband on a lot of land, the eastern limit of which now forms the western boundary of Brock Street.

Her husband and her son Charles (who was of age when his mother died) continued to live there until 1847. But it forms no part of the case that they acquiesced in the supposed dedication.

After this her husband left Canada, and died in England in 1864.

Charles Fitzgibbon commenced this action on the 7th of December 1864, and died shortly after, and on the 27th of March 1865 the action was revived by Agnes Dunbar Fitzgibbon, his widow and devisee in fee.

Mr. Dunn dedicated the land in question as part of Brock Street, "as far as such dedication was in his power, by moving back his fences to the present eastern line of Brock Street in the end of 1840 or beginning of 1841."

From the foregoing statement we gather that Brock Street was an opened travelled street before this removal of the fences, and that by such removal the apparent width of Brock Street was increased. Judging from the description of the land in question it was probably doubled. At the same time the only act of dedication on the part of Mr. Dunn was "by removing back his fences" in 1841, so as no longer to include the land he had conveyed away in November 1825.

It is probable, though not certain, that this removal took place during Mrs. Fitzgibbon's life, for the case states that she died in March 1841, and that the fences were moved "in the end of 1840 or the beginning of 1841."

Upon this state of facts we see no reason to doubt that the legal title is in Charles Fitzgibbon's devisee. We say upon this state of facts, because it seems to us very probable that the whole facts are not before us. For we fail to perceive how Charles Fitzgibbon was driven to an action of ejectment, the premises in question being apparently unenclosed and wholly unoccupied; and nothing appeared on the case to raise a question that his title was displaced by any title which had become vested in the defendants. Nor do we perceive how the defendants can be, on the case stated, deemed to be in possession of the premises; so that he could compel them to become defendants in ejectment.

The dedication by Mr. Dunn, who, as is expressly admitted, had parted with all his title sixteen years before, could not pass any title to the defendants. If the public have otherwise acquired an easement over the premises, this ejectment will not affect it; and a much more obvious course than bringing an ejectment would have raised the question

whether, admitting the soil and freehold to have been in Charles Fitzgibbon when he brought this action, the public generally, not these defendants in particular, had a right of way over it.

On this case we are of opinion the plaintiff is entitled to our judgment.

Judgment for plaintiff.

KINLOCH v. HALL, SHERIFF.

Sheriff—Voluntary escape—Action for—Damages.

In an action on the case as for a voluntary escape, the sheriff having allowed the debtor to go, on obtaining a bond supposed to be good, but which was afterwards decided to be insufficient—*Held*, that defendant might show in mitigation of damages the insolvency of the debtor, notwithstanding the escape was in one sense voluntary. *Savage v. Jarvis*, 8 U. C. R. 331, commented on.

THIS was an action on the case against the sheriff as for a voluntary escape. *Plea*, Not guilty.

Upon a former trial evidence of the value of the defendants' custody was offered by the defendants and rejected. The court, upon motion in term, held that the declaration must be treated as in case, not debt, and that such evidence should have been received; and a new trial was therefore granted. (See *Kingan et al. v. Hall*, 24 U. C. R. 248, and 23 U. C. R. 503, where the facts and pleadings in the case are fully stated.)

The plaintiff Kingan having died, the suit was continued by this plaintiff, his surviving partner, and brought down to trial at Peterborough, before *Adam Wilson, J.*

The evidence rejected at the former trial, to prove that the custody of the debtor was of no value to the plaintiff, was admitted; but the plaintiff contended that as the escape sued for was voluntary, the jury should be directed to give substantial damages or the amount of the debt, referring to *Savage v. Jarvis*, 8 U. C. R. 331.

The learned judge, however, refused to give such direction, and left it to the jury to say what damages the plaintiff had sustained. They found for the plaintiff, and 1s. damages.

Hector Cameron obtained a rule *nisi* for a new trial for misdirection, citing *Connop v. Challis*, 6 D. & L. 48; *Clifton v. Hooper*, 6 Q. B. 468; *Sedgwick on Damages*, 509.

C. S. Patterson showed cause, and cited *Hemming v. Hale*, 7 C. B. N. S. 497; *Arden v. Goodacre*, 11 C. B. 371; *Brown v. Paxton*, 19 U. C. R. 432.

HAGARTY, J., delivered the judgment of the court.

In this case the sheriff discharged the execution defendant from custody on obtaining a bond which was supposed to be sufficient under the statute, but pronounced insufficient by the judgment of the court. In one sense, therefore, the debtor escaped or went at large with the sheriff's consent. It was a voluntary escape.

In *Hemming v. Hale*, sheriff (7 C. B. N. S. 487), defendant having arrested the execution debtor, received from him the debt and costs, part of which he paid to a clerk of the plaintiff's attorney, who embezzled the amount. An action on the case was brought against the sheriff. It seemed clearly conceded that the sheriff had no right to discharge the execution debtor on payment to him of the debt and costs; and the language of *Parke, B.*, in *Woods v. Finnis* (7 Ex. 363) is cited: "If the sheriff's officer permit defendant to go at large on paying to him the sum mentioned in the writ, the sheriff would be liable to him for an escape; for it is a neglect of duty by the officer, seeing that the writ commands the sheriff to have the body at the return to satisfy the plaintiff, and not to pay the debt to the sheriff;" not as in the case of a *fi. fa.*, where the sheriff is to have the money himself.

The question there was whether the sheriff should be allowed the money paid to the clerk (the balance being paid into court). *Erle, C.J.*, says, in answer to the assertion that on a voluntary escape the sheriff cannot retake: "No doubt the plaintiff can take him again—certainly in another county; and, my brother *Williams* thinks, in the same county also." *Williams, J.*: "If the money had been received by the attorney, that would have been a receipt by the plaintiff himself, and would have gone in mitigation of

the damages he might have been entitled to recover by reason of the escape. . . . As a general proposition, no doubt, the true measure of damages against the sheriff for an escape is the value of the body of the debtor at the time ; but I apprehend that, if the debt and costs be afterwards paid, that might be given in evidence in mitigation of damages"—quoting the case from Rolle's Abridgment, of the conversion of the plaintiff's horse and subsequent redelivery to him, which latter fact goes to mitigate the damages recoverable for the conversion.

In *Arden v. Goodacre* (11 C.B. 373) *Jervis, C.J.*, speaking of the action on the case against the sheriff at common law, says: "We cannot find that in any case the principle upon which such damages are to be assessed has been clearly defined. Upon consideration, we are of opinion that the true measure of damages is the value of the custody of the debtor at the moment of the escape. . . . If the execution debtor had not the means of satisfying the judgment at the moment of the escape, the plaintiff will have lost only the security of the debtor's body, and the damages may be small."

This case, as reported, seems to have been for an involuntary escape. We can find nothing positive as to any distinction in the measure of damages between a voluntary and an involuntary escape, except in the case cited in our own court decided in Hilary Term, 15 Vict. 1851, prior by a few months to *Arden v. Goodacre*, and by eight years to *Hemming v. Hale*.

The case in this court was *Savage v. Jarvis* (8 U. C. R. 331). One C., an attorney, was in custody on an attachment for not paying over money, returnable on the first day of Easter Term. Breach, that the sheriff voluntarily permitted him to escape, and had him not at the return.

Robinson, C.J., said: "In case, the recovery may be for less than the whole amount. But that distinction" (viz. between case and debt) "can surely never be allowed where the escape is voluntary. . . . Where the sheriff voluntarily lets the party who is in execution go, we think the jury should be told that it is proper to give damages to the amount of the debt, especially where it is not so large as to justify the

assumption that it would not be paid under the pressure of coercion, even though the debtor may have no visible property."

The judgment of the court seems to decide the case on a reasoning suggestive of the danger and unfairness of allowing a sheriff "to exercise his own discretion, and turn out all his prisoners, because he might choose to think that the plaintiff would gain no advantage by detaining them."

Now the escape of the debtor in the case before us was no doubt voluntary, in the sense that the sheriff allowed the debtor to go at large, believing that he had given the security required by law; just as the sheriff, in the case of *Woods v. Finnis*, allowed him to go on payment of the debt and costs. In both cases the escape was voluntary, and in both the sheriff is liable. In substance, however, they both differ widely from what is commonly called a voluntary escape, where the sheriff or his officer allows the debtor to go at large without any apparent excuse, but wilfully and knowingly.

We hardly see how the principle laid down in *Hemming v. Hale* should not apply to the case before us. Here the sheriff says in effect, "By an error in taking what I thought was a valid bail bond I became responsible to the plaintiff for damages, but they should be commensurate with the loss sustained by my mistake."

If he be allowed to prove in mitigation of damages that after the cause of action accrued he paid the money to the plaintiff, whereby the plaintiff was either less or not at all damnified, should he not on the same principle be allowed to show, not to bar the claim but as a guide to the measure of damages, the value of the custody of the debtor's body which his breach of duty had caused to be lost.

It seems after all, at least in a case where no bad faith or wilful breach of duty is proved, to resolve itself into the ordinary question of damage in an action on the case—namely, the value of the thing lost by defendant's default.

It would seem a hard measure of justice that where a sheriff allowed a hopeless insolvent to go at large, not wilfully but on a bail bond insufficient from a mistake in

form, he should be made pay a debt of thousands of pounds, though the proof was overwhelming that neither the debtor nor his custody was worth as many farthings.

As the case in 8 U. C. R. was decided prior to the important cases already cited, we think we may still treat the point as open to decision, and therefore we discharge the rule.

Rule discharged.

JAMES HUNTER AND MARY HIS WIFE v. JOHN HUNTER AND
ANN HIS WIFE.

Slander.

The words, "Go home, you whore, and steal more potatoes from Peggy's field, and steal more chemises from us"—*Held*, actionable, for they imputed that the person addressed had previously stolen other things of the same kind; and the potatoes might have been severed, and so the subject of larceny.

In the *Nisi Prius* record the declaration appeared to have been against John Hunter and Ann Hunter his wife, but the words "his wife" were struck out with a pen, of which no explanation was given. *Held*, no objection after verdict.

SLANDER.—The declaration contained four counts. On the first the jury found for the defendants; on the second the plaintiffs had a verdict for \$175. There was a demurrer to the third and fourth counts, and to these the plaintiffs undertook to enter a *nolle prosequi*.

The second count alleged that the defendant Ann Hunter falsely and maliciously spoke and published of the plaintiff Mary Hunter the words following: "Go to Peggy's field" (meaning the field of one Mrs. Blaney), "and steal more potatoes from her, and steal more chemises from us," meaning the defendants; "I can prove all this."

Plea, Not guilty.

In the *Nisi Prius* record the declaration as at first written complained of the defendant John Hunter and Ann Hunter his wife, but the words "his wife" were struck out with a pen.

The trial took place at L'Original, before *Morrison, J.*, when the plaintiff recovered a verdict on the second count for \$175.

S. Richards, Q.C., obtained a rule nisi to show cause why there should not be a new trial, on the ground that the words charged were not proved, and for excessive damages; or why the judgment should not be arrested, or arrested as to the defendant John Hunter, the words not being actionable, and no cause of action against the defendant John Hunter being shown in the declaration. He cited *Flower v. Pedley*, 2 Esp. 491; *Smith v. Knowelden*, 2 M. & G. 561; *Walters v. Mace*, 2 B. & Al. 756.

Moss showed cause, citing *Conkey v. Thompson*, 6 C. P. 238; *Smiley v. M'Dougall*, 10 U. C. R. 113; *Add. Torts*, 722; *Cooke on Defamation*, 170.

HAGARTY, J., delivered the judgment of the court.

We have carefully compared the words charged and those proved, and find the variance so slight as to be readily amendable.

The next objection is that the words are not actionable. The words proved are, "Go home, you whore, and steal more potatoes from Peggy's field, and steal more chemises from us."

These words, it seems to us, may be reasonably understood to impute that the person addressed had previously stolen other potatoes and chemises.

It was objected that stealing potatoes from a field would not impute a larceny or indictable offence. The potatoes might have been severed, and might be in pits in the field or stacked on the ground; and if so, clearly a subject of larceny. It does not appear that this was objected at the trial. Such an objection would not of course apply to the charge as to the other articles mentioned in the same sentence.

We think it impossible to arrest the judgment on this count.

As to the amount of damages, they certainly do seem unusually high, £43, 15s.; and the learned judge who tried the case reports it as one in which he expected either a verdict for defendants or nominal damages. But we could not interfere, except upon payment of costs; and, besides, are not prepared to lay down any rule that a sum under £50 is an excessive amount to award against the utterer of

an accusation of a very serious nature, urged in most abusive language.

As to the words "his wife" appearing on the record with a pen drawn through them, no explanation is given to us as to how this was done. There has been a verdict against both defendants for words spoken only by Ann Hunter. It must have been proved at the trial that she was the wife of the co-defendant, or there would have been necessarily a nonsuit, at least as to the male defendant. In the absence of explanation we cannot after verdict, when we may reasonably infer that the fact of the relationship of the parties must have been proved, interfere on the ground of this alleged mistake.

We discharge the rule.

Rule discharged.

GRIMSHAWE v. BURNHAM.

Sale for taxes—Fixtures—Estoppel.

Two millstones were seized and sold for taxes, the tenant of the mill, who was assessed as occupant, being present at the sale and making no objection. In replevin by the owner of the mill against the purchaser, *Held* (affirming the judgment of the County Court), that the tenant's acquiescence was immaterial; for his possession, when proved to be merely as occupant, was no proof of property, and the plaintiff therefore was not prevented from disputing the sale, which was clearly illegal, the stones being part of the mill.

APPEAL from the County Court of Northumberland and Durham.

Replevin for two millstones. *Plea*, that the said stones are not the plaintiff's.

It appeared that the stones were seized for taxes, and sold by the bailiff at public auction to the defendant. One White was in possession of the mill where they were in use, and they had previously been taken from their place by his directions, for the purpose of being levelled, and were lying on the floor when seized. He was present at the sale and made no objection, but the plaintiff's attorney told the bailiff that they were part and parcel of the mill and could not be

sold for taxes, and he forbad the sale. Possession of the mill was given by White to the plaintiff a few days after, and the defendant subsequently to this took the millstones away. The assessment roll was produced, by which it appeared that the plaintiff was not assessed for the mills. Charles White was assessed as occupant and Mrs. White as owner.

A verdict was taken for the plaintiff, subject to the opinion of the court.

It was admitted in the argument in the court below that the millstones were not subject to seizure for taxes if objected to, and that if White had forbidden the sale he would have had no right of action against the defendant; but it was contended that the sale having taken place while he was in possession, and without any objection on his part, although he was present, the property passed to the defendant, and he had therefore a right at any time to take them away.

Judgment having been given for the plaintiff, the defendant appealed.

C. S. Patterson, for the appellant, cited *Gregg v. Wells*, 10 A. & E. 90; *Portman v. Patterson*, 21 U. C. R. 237.

Moss, contra, cited *Nicolls v. Bastard*, 2 C. M. & R. 659; *Macfarlane v. Giannacopulo*, 3 H. & N. 860; *Swan v. North British Australasian Co.*, 7 H. & N. 603, 633; *Ex parte Swan*, 7 C. B. N. S. 400; *Sheffield R. W. Co. v. Woodcock*, 7 M. & W. 583; *Lines v. Grange*, 12 U. C. R. 209.

DRAPER, C.J., delivered the judgment of the court.

We think this appeal should be dismissed.

Before White's acquiescence by not prohibiting the sale could have any operation at all, it must appear that he had a right either to permit or to prohibit. But it appears from the evidence of the contents of the assessment roll that he was merely occupant, and that another person was owner. Hence his being in possession was no proof of his right to the property. The plaintiff's right to the mill appears to have been tacitly conceded all round, and his right to the millstones, unless the sale of them by the bailiff was effec-

tual, follows as a consequence. We are of opinion that the sale was illegal, and that there is nothing proved sufficient to prevent the plaintiff from showing that illegality.

Appeal dismissed.

VAN NORMAN AND WIFE v. HAMILTON.

Evidence—Husband and Wife.

Where husband and wife were plaintiffs in an interpleader issue, asserting the wife's title to the goods seized. *Held* that the proviso in C. S. U. C., ch. 32, sec. 5, prevented the defendant from calling the wife as a witness, and that the Married Women's Act, ch. 73, had not altered the law in this respect.

THIS was an interpleader issue, tried at Hamilton, before *Morrison, J.*, in which the plaintiffs, husband and wife, sought to assert the wife's title to goods seized under an execution against a person claiming through the husband.

The defendant proposed to call the wife as a witness, urging that she was a plaintiff on the record, and therefore not disqualified by the proviso in the Consol. Stat. U. C., ch. 32, sec. 5, which should be applied only when the husband was suing alone.

The learned judge, however, rejected the witness; and the court, on motion for a new trial, confirmed his ruling, holding that the Married Women's Act, Consol. Stat. U. C., ch. 73, did not affect the case, or change the law of evidence, and that the wife was clearly included in the proviso referred to.

E. Martin for the defendant, *Miles O'Reilly, Q.C.*, contra.

MEMORANDA.

During this term the following gentlemen were called to the bar: MICHAEL DRISCOLL, JAMES FLETCHER M'DONALD, JAMES ROBB, MORGAN COLDWELL, ALFRED HASKIN, THOMAS BOYLE, DANIEL FREEMAN, RICHARD THOMAS WALKEM, WILLIAM ALBERT REEVE, BERNARD LOUIS DOYLE, SOLOMON WHITE, CHARLES EDWARD HAMILTON, PETER M'VEAN CAMPBELL, EDMUND HENRY DUGGAN.

IN THE
COURT OF QUEEN'S BENCH,
AND THE
COURT OF COMMON PLEAS.

Regulæ Generales.

The following rule was read in court :—

“ Michaelmas ” Term, 29th Victoria.

It is ordered,—That the Table of Costs established by the Rule of this Court, of Trinity Term, 20th Victoria, be amended in that part of it relating to Attorneys, and headed “ Copy and Service of Writs of Summons and other Process,” by adding as follows :—

Copy and Service of Writ of Subpoena ad Testificandum, exclusive of mileage..... 50 cents.

It is ordered,—That in all cases where leave is given to raise an Issue or Issues of Law, together with an Issue or Issues of Fact, to any Declaration or subsequent Pleading, the Issue or Issues of Law shall be determined before the Trial of the Issue or Issues of Fact, unless otherwise expressly ordered by the Court or Judge in the Rule or Order permitting such Issue or Issues to be raised.

Dated 2nd December, A.D. 1865.

(Signed) WM. H. DRAPER, *C.J.*
WM. B. RICHARDS, *C.J., C.P.*
JOHN H. HAGARTY, *J.*
JOS. C. MORRISON, *J.*
ADAM WILSON, *J.*
JNO. WISON, *J.*

HILARY TERM, 29 VICT. 1866.

(February 5th to February 17th.)

Present :

THE HON. WILLIAM HENRY DRAPER, C.B., C.J.

” ” JOHN HAWKINS HAGARTY, J.

” ” JOSEPH CURRAN MORRISON, J.

JONES *v.* JENKINS.

Interpleader—Identity of Goods.

In an interpleader issue the plaintiff rested his case upon proof of a chattel mortgage of certain goods mentioned therein, made to him by the execution debtor and duly filed. *Held*, clearly insufficient, for it afforded no proof that the goods mortgaged were the same as those seized by the sheriff and claimed.

INTERPLEADER, to try whether goods seized on execution at the suit of the defendant against James Kerby were the property of the plaintiff as against defendant.

The plaintiff's case was rested upon proof of the execution of a chattel mortgage made to the plaintiff by the execution debtor of certain goods mentioned therein, and that such mortgage was duly filed by the proper officer.

The defendant objected that this did not show that the goods seized, and in question in the issue, were the same goods as those mortgaged.

It had been, at the opening of the case, agreed between the parties that the sheriff should ascertain what portion of the goods yet remained in the Kerby House (within the county of Brant) of the goods mentioned in the mortgage. The learned judge stated he understood no more to be meant than that the question was to be whether any goods to which the plaintiff proved title remained in the Kerby House.

The plaintiff would not give any further evidence, though

the learned judge offered to receive it. And the learned judge directed that the jury might assume that the parties both knew which were the goods about which they were contending.

The defendant's counsel objected the jury should have been told there was no evidence that the goods mentioned in this mortgage were those seized and now in question. Leave was reserved to move, and the plaintiff had a verdict.

E. B. Wood, in Michaelmas term, obtained a rule to enter a nonsuit on the leave reserved, to which *M. C. Cameron, Q.C.*, showed cause.

Moss supported the rule, citing *Allen v. Cary*, 7 E. & B. 463; *Mummery v. Paul*, 1 C. B. 316; *Gadsden v. Barrow*, 9 Ex. 514; *Grant v. Wilson*, 17 U. C. R. 144.

DRAPER, C.J., delivered the judgment of the court.

No affidavits explanatory of the matter have been produced to us on either side, and upon the learned judge's report it appears that the plaintiff had an opportunity of removing a difficulty in the sufficiency of the evidence to identify certain goods over which he had a chattel mortgage, which goods the sheriff had seized, and which were at the Kerby House at Brantford. He let his case go to the jury without other proof than the chattel mortgage, and that by itself certainly did not entitle him to succeed on the issue, for it did not appear that those were the goods seized by the sheriff and claimed by the plaintiff.

We do not very well see what there was to leave to the jury, and perhaps in strictness we should make the rule for nonsuit absolute. The plaintiff's counsel asserts that there were two other cases tried, involving other portions of the property seized at the same time by the sheriff, and that some misapprehension arose as to the extent of some admissions to be made. It will probably be more for the ends of justice to have the matter fully investigated, and for that purpose to grant a new trial on payment of costs by the plaintiff, as the objection taken is fatal as the case now stands; and this must be done within a month, otherwise the rule will be made absolute to enter a nonsuit.

ROGERS v. MUNNS.

*Slander—Evidence objected to by plaintiff—Verdict for 1s.—
New trial refused.*

Slander of the plaintiff as a physician, with respect to his treatment of one H., deceased, whom he had attended after her confinement. Plea, Not guilty. Evidence of statements made by H. to the same effect as the words charged was received, though objected to, as showing that defendant did not originate the alleged slander; and the plaintiff had a verdict for 1s.

Quære, whether such evidence was admissible, but

Held, that its improper reception would be no ground for a new trial, for the plaintiff had notwithstanding obtained a verdict, and he did not move for smallness of damages.

THIS action was brought to recover damages for words spoken of the plaintiff in his profession of physician and man midwife, imputing to him want of skill and maltreatment in his professional attendance upon one Elizabeth Hodgins. The only plea was not guilty.

The trial took place in October 1865 at the assizes for the United Counties of York and Peel, before *Adam Wilson, J.*

It appeared that the plaintiff was called in to attend Elizabeth Hodgins immediately after she had been delivered of a child; that she lived a week, during which the plaintiff attended her; and that immediately after her death, and thenceforward at different times, the defendant spoke the words charged in the declaration, charging the plaintiff with being the cause of her death. More than one witness said the defendant told them that he (defendant) had heard Mrs. Hodgins say that the plaintiff had murdered her from her family. This was given in support of the plaintiff's case. Several of these statements were made by defendant on the day of Mrs. Hodgins' funeral.

Rumours as to the death of Mrs. Hodgins were in circulation immediately after her death, at her funeral and after, unfavourable to the plaintiff and his treatment of her. There was evidence of special damage, which was charged in the declaration. It also appeared that the plaintiff and defendant had discussed a settlement of this suit during the assizes, but before the trial, and the defendant afterwards said the settlement he and plaintiff had come to was that defendant

should pay all expenses, and go home and try to be friends. The arrangement however fell through.

On the defence evidence was given of what Mrs. Hodgins had said after her confinement, some statements having been made on the day of her death, and some the day before, to the same effect as the words spoken by defendant. This was objected to, but the evidence was admitted, as showing that the defendant did not originate the alleged slander. Her statements however asserted some particulars of the plaintiff's treatment of which it was not proved that defendant had ever spoken, if indeed he had heard of them, while other statements were to the effect of what defendant had said he heard from her as stated above. This testimony was objected to.

It also appeared from the evidence of Michael Hodgins, who was called for the defence, that the defendant's wife, who was in the habit of acting as a midwife (apparently gratuitously) had been with the deceased during her confinement on this occasion, and that the plaintiff did not attend her till after delivery; and it had been stated by one of the plaintiff's witnesses that defendant tried to impress on his mind that the plaintiff was to blame, and that the plaintiff tried to put the blame on defendant's wife, but that (as defendant said to this witness) it was not her fault, it was plaintiff's.

The learned judge charged in the plaintiff's favour as to his having made out a case entitling him to a verdict, leaving the question of damages to the jury, the defendant's counsel taking exceptions.

They found for the plaintiff, damages 1s.

In Michaelmas term *M. Michael* obtained a rule calling on the defendant to show cause why there should not be a new trial, on the ground that the learned judge admitted improper evidence, allowing defendant to prove what was said by a person now deceased, and statements she made as to what was the cause of her death, and refused evidence that the plaintiff's treatment was proper; and also in admitting

evidence of what was said by other persons respecting other cases in which the plaintiff had been engaged.

Robert A. Harrison showed cause during this term, citing *Rosc. N. P.*, 9th ed., 545; *Bennett v. Bennett*, 6 C. & P. 588; *Guy v. Gregory*, 9 C. & P. 587; *Edgar v. Newell*, 24 U. C. R. 215; *Cornwall v. Richardson*, R. & M. 305; *Richards v. Richards*, 2 Moo. & Rob. 557; *Thompson v. Nye*, 16 Q. B. 175; *Wyatt v. Gore*, Holt N. P. C. 299; *Mayne on Damages*, 280; *Gilman v. Lowell*, 8 Wend. 573.

DRAPER, C.J., delivered the judgment of the court.

The plaintiff's counsel abstained altogether from making the smallness of the damages any part of the foundation of this application, feeling probably that unless he could succeed on grounds independent of that he could not hope to succeed at all.

But that concession seems to us fatal to his succeeding on any ground. Let it be conceded that some evidence was rejected or received improperly, or that there was a misdirection in point of law. Nevertheless the plaintiff has the verdict, and, apart from the amount of damages, had everything at the trial been ruled in his favour a verdict for the plaintiff was all he contended for, or could contend for, before another jury. If this were an action of ejectment, where there are no damages, or of replevin, where damages for the plaintiff are merely nominal, on what pretence could the plaintiff expect to set aside a verdict in his own favour? If on any, certainly not on the grounds on which this rule is moved.

The verdict in this case establishes that he was wrongfully charged by the defendant with having caused the death of a patient by negligence or improper treatment on his part as a physician, but the verdict is unaccompanied by the *solatium* of substantial damages, which is all that he can hope to get by a second verdict in addition to what he has got by the first; and the want of this *solatium* he tacitly disclaims as the object of the present application. It may be quite true that the popular effect of this verdict may be almost the same as if it had been rendered for the defendant, but we do not think it possible to give any weight to such a consideration.

Nothing that is complained of in the rule has had any effect on the jury so as to prevent their giving the plaintiff a verdict. This the plaintiff is forced to admit is right; and more, that in his contention it has been given under adverse and improper ruling. If this were so, his application is to set aside what is right, because if improper evidence or improper ruling had influenced the jury it would have been wrong.

In all this it is assumed the plaintiff was right in the objection he took, but it must be understood we do not so decide, for it appears to us unnecessary to consider this question. There may be difficulty in holding that the statements of Mrs. Hodgins, not made either to the plaintiff or to the defendant, or in their hearing, were admissible as against the plaintiff. The defendant has not justified, and on the plea of not guilty he cannot, either in bar or mitigation of damages, prove that what he said was true.

But for the reasons above given we think this rule should be discharged.

Rule discharged.

SHAVER *v.* JAMIESON, TENANT, AND CLARK, LANDLORD.

Ejectment—Proof of title—Possession.

In ejectment for the east half of a lot the plaintiff proved a deed to him from S. of the whole lot executed in 1865, and that persons claiming under S. had lived from 1837 to 1850 on part of the west half, building a log house and clearing four or five acres. It was not shown that S. had been dispossessed by any one; and the defendant, with those through whom he claimed, had been in possession since about 1850. The plaintiff having obtained a verdict, defendants' counsel objecting that no title was shown,

Held, that this evidence was not sufficient to go to the jury; but the attention of the judge at the trial not having been drawn to the particular question, the costs on granting a new trial were ordered to abide the event.

EJECTMENT for lot No. 9 in the second concession of Winchester. Defence by the landlord for the east half of the lot. Jamieson did not appear.

The plaintiff claimed title by deed from Peter Shaver, dated 11th August 1865.

The defendant set up a title by deed from John M'Dowell,

to whom Henry G. Merkley made a deed, and that Merkley had a deed from Alexander M'Lean, who had a deed from the Sheriff of Stormont, Dundas, and Glengarry.

The trial took place at Cornwall in October 1865, before *Hagarty, J.*

The plaintiff proved the execution of a deed, dated 10th of August 1865, whereby, in consideration of \$1, Peter Shaver granted to him in fee lots nine in the second concession and six in the third concession of Winchester. This deed contained no covenants.

The plaintiff next called his father as a witness, and he swore he knew this lot; that one Harman made an agreement with Peter Shaver, under which he went on the lot and built a shanty, and was there about three years; that one Bridge went on the lot after Harman, in 1838 or 1839, under an arrangement with Peter Shaver to clear and prevent trespasses, and was there several years after 1840; that the lot was wild in 1837, and, as this witness understood, it had been previously sold for taxes. Now there were valuable improvements upon it, a good frame barn and house.

Another witness (James Grey) proved the occupation by Harman and Bridge, and that Bridge left in the fall of 1845, after which the witness's father occupied under some writing from Peter Shaver up to 1850, pasturing the lot and making sugar on it. There were about four or five acres cleared when Bridge left, and a small log house built. There was no barn then, and it afterwards turned out that the log house and part of the clearing was on the road allowance, and that Harman's shanty and part of the clearing was on the west half, and not on the east half of the lot. This witness's father, about the time he left the lot, was served with some process by M'Lean. About the year 1852 one Bower entered, claiming to have bought from one Merkley. John M'Dowell succeeded Bower in March 1853, and next the defendant Clark came.

The defendant's counsel objected that the evidence showed no title in the plaintiff, and he called no witnesses; and the

plaintiff obtained a verdict, the learned judge ruling that there was evidence to go to the jury.

In Michaelmas term *C. Robinson, Q.C.*, obtained a rule calling on the plaintiff to show cause why there should not be a new trial on the law and evidence, and for misdirection, in this that the plaintiff gave no evidence sufficient to entitle him to maintain this action; or on the ground of the discovery of new evidence, and of surprise, filing affidavits; and why defendant should not have leave to amend his notice of title by adding a claim by length of possession.

In this term *Kerr* showed cause, citing *Doe Hughes v. Dyeball*, 3 C. & P. 610; *Doe Hall v. Penfold*, 8 C. & P. 536; *Doe Humphreys v. Martin*, C. & Marsh. 32; *Doe Carter v. Barnard*, 13 Q. B. 945; *Doe Harding v. Cooke*, 7 Bing. 346; *Burton*, R. P., 8th ed., 145; *Doe Pitcher v. Anderson*, 1 Stark. 262.

C. Robinson, Q.C., contra, cited *Hunter v. Farr et al.*, 22 U. C. R. 329.

DRAPER, C.J., delivered the judgment of the court.

In *Doe Carter v. Barnard* (13 Q. B. 953) *Patteson, J.*, who delivered the judgment of the court, referred to *Doe v. Dyeball* (M. & M. 346) and *Doe v. Martin* (C. & Marsh. 32) as establishing that where a person is in possession of premises, and the defendant turns such person out, the defendant must show title, or the other party will recover in ejectment by merely proving his possession; for the turning out was *prima facie* the act of a wrong-doer, and against such a one the prior possessor will be presumed to have title.

Here the plaintiff relies on evidence of a possession by Peter Shaver, somewhat uncertain in its commencement, not going back further than 1837, and ending in 1850—not more at the utmost than about fourteen years; and upon this alone he seeks to eject the defendant, who with those through whom he claims title have been in possession since 1852, and possibly since 1850, this action being commenced

in August 1865. No other proof of title in Peter Shaver is given. He has not been in possession since 1850, and it is not proved that he was dispossessed by any person's act, except that it appears that other parties were found in possession. He was not turned out.

In the absence of any title except the presumption arising from possession, another question arises. Assuming Harman to have acted under Peter Shaver, he builds a shanty on the west half of this lot No. 9, and not on the east half for which the defendant appears, and his clearing is proved to be in part on the west half. Then Bridge, who comes in under Peter Shaver after Harman, builds a log house on the allowance for road, on which some of the clearing was made. The deed put in by the plaintiff shows that Peter Shaver professed to own the whole of lot 9, and there is scarcely a scintilla of evidence that either Harman or Bridge took possession of any part of the east half. Not a word is said by the plaintiff's first witness (his own father) to distinguish the east half; and though he speaks of Harman having built a shanty on it, as the shanty turns out to be on the west half his evidence can hardly be said to prove a possession of the east half.

The second witness (Grey) speaks of "this lot," which may refer to the east half which is in dispute; but he also speaks of the building a log house as proof of possession, and this is not on No. 9 at all, while he states that Bridge's clearing was partly on the west half of No. 9 and partly on No. 10, the whole clearing being four or five acres.

It does not appear to us that this evidence establishes that Peter Shaver had through these parties possession of the east half of this lot. The plaintiff is claiming one hundred acres, assuming the whole lot to be of the usual size, and the plaintiff claims on this evidence of possession, ending in 1850, to take defendants' frame house and barn and clearing erected and made since that possession was apparently abandoned in 1850.

The principle is, the plaintiff must recover by the strength of his own title, although the defendant opposes nothing but the fact of possession. In *Asher v. Whitlock* (1 Law Reports,

Q. B. 5), *Cockburn, C.J.*, says, "I take it as clearly established that possession is good against all the world except the person who can show a good title, and it would be mischievous to change this established doctrine." We fully subscribe to this, and think the plaintiff has not shown a good title against defendants' possession, of which there is abundant proof.

We rest nothing upon the affidavits, except to found the application by the defendant to amend his notice of title. The affidavit of Mr. Alexander M'Lean may justify this indulgence, which we are willing to concede.

But we think the evidence did not entitle the plaintiff to a verdict, or even to go to the jury, and therefore there should be a new trial—with costs to abide the event, as the attention of the learned judge was not drawn to this particular question.

Rule absolute.

STUDER v. THE BUFFALO AND LAKE HURON RAILWAY CO.

R. W. Co.—Fences—C. S. C. ch. 66, sec. 13.

The obligation of a railway company, under section 13 of "The Railway Act," to maintain fences on each side of their track involves the duty of a continuous watchful inspection, and they must take notice of its state at all times.

Held, therefore, in an action by an adjoining proprietor for injury to his horses getting upon the track through defect of fences, that it was a misdirection to tell the jury that if the fence became out of repair, and before the plaintiff notified the defendants, or before a reasonable time for the defendants to repair it had elapsed, the horses got through, the defendants would not be liable.

Quære, as to the liability if the fence, being sufficient, had been prostrated by an extraordinary tempest and repaired without unnecessary delay.

DECLARATION that the plaintiff was possessed of a close, being lot number one in the first concession of Fullarton, and also of two horses which were depasturing on the said close; that defendants were possessed of a railway, constructed by them over lands immediately adjoining the plaintiff's close, and of locomotive engines and carriages used by them on such railway; that it was the duty of defendants to erect and maintain sufficient fences on the

line of their railway, including that portion adjoining the plaintiff's close; yet the defendants did not maintain but suffered the fences to be broken and out of repair, by means whereof the plaintiff's horses strayed from his said close upon the defendants' railway, and were run over by a locomotive engine, and one of them was so injured that it became necessary to kill him, and the other was permanently injured.

Plea—Not guilty, by statute, ch. 66, Consol. Stat. C.

The case was tried at Stratford, in October 1865, before *John Wilson, J.*

It appeared that the plaintiff had two horses in a field adjoining the railway, as stated in the declaration; that on the 25th of May a witness saw them running along the railway track, where they were injured as complained of by a locomotive of the defendants. Evidence was given that two days before the accident the posts of the fence were rotten, and the boards loose, the nails appearing to be broken; some boards loose at the ends but nailed in the middle. At the place where the horses got out of the plaintiff's close there were three boards off and two on. One of the boards lying on the ground was broken. It was also stated that the fence was never sufficient.

A nonsuit was moved for, on the ground that the plaintiff did not show that he requested the defendants to make a fence between his land and theirs, and that without such request he could not maintain this action. This objection was overruled.

On the defence it was sworn that the fence was a good one, four feet seven inches high, made of posts and four boards, and a cap on the top; that where the horses appeared to have got out the cap board looked as if swung in towards the railway, and the upper board was broken in three pieces, and a few little splints remained on the centre post. The boards were sound. Some of the nails in the lower boards in different places were broken, as if by persons climbing over the fence and putting their feet on the boards.

The learned judge directed that if the plaintiff adopted

this fence when first made as one of ordinary height and strength, he could not at the trial object to its sufficiency—he should have objected before; that assuming the original sufficiency, if the plaintiff's horses broke down the fence and so got upon the railway, the defendants were not liable; that if the fence became out of repair, and before the plaintiff gave notice to the defendants of the want of repair, or before a reasonable time for the defendants to make the repair, the plaintiff's horses got upon the railway, the defendants were not liable.

The plaintiff's counsel excepted to this direction on each point.

The jury found for the defendants.

In Michaelmas term *C. Robinson, Q.C.*, obtained a rule calling on the defendants to show cause why there should not be a new trial for misdirection, contending, *first*, that an adoption of the fence by the plaintiff would not relieve the defendants from the duty of maintaining it, and if it would, such adoption was not proved; *second*, that the proper question for the jury was whether the fence, at the time the horses got through it, was of the height and strength of an ordinary division fence, for if not the defendants would not be released from liability though the plaintiff's horses did break it down; and, *thirdly*, that the defendants were bound by the statute to maintain the fence, and want of notice or of reasonable time would not excuse them.

He also asked for a new trial on the ground of surprise at the evidence that the fence appeared to have been broken down by the plaintiff's horses, as splinters of the board were still attached to the post. He filed the plaintiff's affidavit to support this ground.

E. B. Wood showed cause during this term, and argued that the charge was right as to the first and second points, and that on the third point it was in the main proper, because the plaintiff must be taken to know the state of the fence enclosing his own land; and if, knowing it was insecure, he put his horses into the field without giving warning to the defendants, he could not recover.

Elliott v. The Buffalo and Lake Huron R. W. Co., 16 U. C. R. 289, was referred to for the plaintiff.

DRAPER, C.J., delivered the judgment of the court.

The 13th section of "The Railway Act" (Consol. Stat. C. ch. 66) makes it the duty of the defendants to erect and maintain on each side of the railway fences of the height and strength of an ordinary division fence. The 19th section of the same statute has, as was pointed out by Mr. Robinson, no application to this case, for the reasons given in *Elliott v. These Same Defendants* (16 U. C. R. 289).

The proprietors of land adjoining the railway track are not the only persons interested in the observance by railway companies of the enactments respecting fences. Travellers and forwarders of goods have also an interest in being protected from dangers and injuries to be occasioned by cattle straying upon the track, and the adoption of an insufficient fence by a proprietor of adjoining land would be no answer in case of damage to a third party plainly attributable to such insufficiency, though the proprietor himself might be prevented from objecting after he had adopted or consented to a fence as sufficient to keep his cattle within his own lands. In the present case, however, we see no evidence of such adoption, nor any worth noticing as to the escape of the horses being attributable to the original insufficiency of the fence, nor does the plaintiff so allege in his declaration. The first point in the direction appears to us not to require consideration, as not having upon the evidence any effect on the verdict; and we think that assuming, as we think the jury ought to have done and have done, that the fence was at the time of the accident as the statute required it to have been in the first instance, if the plaintiff's horses broke it down he cannot recover; and in our opinion the case turns upon the question of the defendants having fulfilled the duty of maintaining the fence, and of the propriety of the direction upon that head.

The question suggested by the defendants' counsel on the argument as to the plaintiff's right to recover if he put his horses into the field knowing that the fences were out of re-

pair, without notifying the defendants, does not arise on the evidence nor on the direction, and need not therefore be further noticed than by the general observation applicable to the third objection to the charge to the jury, that the defendants were bound to maintain the fence irrespective of any notice to them that it required repairs.

The fence is the defendants', under their care and control, and the duty of maintaining it is exclusively theirs. If the fence were of good and sufficient height and strength, as the statute requires, and notwithstanding the plaintiff's horses broke it down, he is not, as we have already said, entitled to recover; perhaps not if the fence, being an "ordinary" good division fence, were prostrated by an extraordinary tempest and no unnecessary or unreasonable delay in repairing. But the duty of maintaining appears to us to involve the duty of a continuous watchful inspection, and that the defendants must take notice of the state of the fence at all times, and do whatever is necessary to maintain it as good and sufficient. Hence we cannot see that they were entitled to notice of its being out of repair. They were in the wrong when they suffered it to get into that condition. Their duty in *maintaining* was not fulfilled when it became actually less than what the statute defines—that is, less than the height and strength of an ordinary division fence.

We regret the necessity of this decision, as we think the evidence, apart from the miscarriage, sustains the verdict. Juries are, we fear, often led by fellow-feeling, and sometimes by prejudice, to take too favourable a view of the evidence for the plaintiff in cases of this description, and it does not often happen that there is a just cause of complaint against a verdict for the defendants in cases of this character; but we apprehend the legal exception must prevail, and we must order a new trial without costs.

Rule absolute.

CHILDS ET AL. v. THE NORTHERN RAILWAY OF CANADA.

Sale of goods—Stoppage in transitu—Trover.

The plaintiffs, at Montreal, having sold goods on credit to H. & Co., living at Meaford, on Lake Huron, shipped them by the Grand Trunk Railway to Toronto, and thence by defendants' railway to Collingwood. While they were at Collingwood defendants received notice of stoppage *in transitu*, but they delivered the goods to H. & Co., who were found by the jury to have been insolvent at the time of the notice; and the plaintiffs thereupon brought *trover*.

Held, that the action would not lie, for the goods by the sale and delivery to the carriers were at the purchasers' risk, and the stoppage *in transitu* did not give the plaintiffs the right of property and possession necessary to maintain *trover*.

THE plaintiffs sued the defendants in *trover* for goods and merchandise. The pleas were not guilty, and that the goods were not the goods of the plaintiffs. The action was brought on the 5th of February 1865.

The trial took place in January 1866 at Toronto before *Morrison, J.*

It was admitted on both sides that the goods mentioned in the declaration were the goods contained in an invoice produced, headed:—

“Montreal, April 15th, 1864.

Messrs. Henderson & M'Intosh, Meaford,

Bought of George Childs & Co.

Terms—Note at 4 months, or $2\frac{1}{2}$ per cent. discount for cash, subject to draft if note is not remitted within 20 days.”

The various goods with prices were then set out, the total amount being \$366·36.

These goods were at the date of the invoice the property of the plaintiffs, and are still unless they became the property of Messrs. Henderson & M'Intosh of Meaford by the sale shown by the invoice and the facts hereafter mentioned.

The goods were of the value of \$366·36, and were sold upon credit to Henderson & M'Intosh, with interest to be paid after the 15th of August 1864.

The goods were shipped by the plaintiffs by the Grand Trunk Railway to Toronto, and thence by defendants' railway to Collingwood, on or about the 16th of April 1864, addressed to Henderson & M'Intosh, Meaford, on Lake Huron.

The goods arrived at Collingwood on or about the 23rd of April 1864, and remained there until the 18th of May 1864 in the possession of the defendants, on which day they were forwarded by defendants to Henderson & M'Intosh at Meaford.

On the 23rd of April 1864 the plaintiffs gave notice to the Grand Trunk Railway Company not to deliver the goods to Henderson & M'Intosh, with the intention of stopping the goods *in transitu*, and if delivered to defendants to get them detained.

On the 5th of May 1864 the following letter was written by defendants' freight agent at Collingwood to the plaintiffs, and was received by them:—

“Collingwood, 5th May 1864.

Messrs. G. Childs & Co.

Gents.—The goods consigned to Henderson & M'Intosh are still detained at this point. If you wish them returned, please make the arrangements with F. W. Cumberland, the Managing Director of the Northern Railway at Toronto.

M. NORTHRUP.”

A witness who was called for the plaintiffs stated that on the 18th of May 1864 he applied, on behalf of the plaintiffs, to Mr. Jackes, the defendants' freight agent, for these goods. Mr. Jackes said he was aware they had been stopped in transit, and that Mr. Cumberland, the general manager, had given orders that the company had no right to retain them. The witness went to Collingwood the next day, and found that the goods had gone on to Meaford. He went there, and found they had been delivered to Henderson & M'Intosh.

Evidence was given to show that Henderson and M'Intosh were insolvent; that Henderson had scarcely ever been at Meaford during the time the business was carried on; that M'Intosh left Meaford about the 8th of March 1865, and had not returned; that his brother-in-law took possession of his place, and sold the goods to some merchants in Meaford.

A nonsuit was moved for, because—1st, Trover was not maintainable—admitting the right of stoppage *in transitu*;

that the effect of the exercise of the right is not to revest the property, it only gives the vendor a right on obtaining repossession of the goods to retain them as security for the price. 2nd, That an action should have been brought against the Grand Trunk Railway Company for wrongfully delivering the goods after notice of stoppage *in transitu*. 3rd, That before an action could be maintained against either company, a tender of the freight upon the goods was necessary. 4th, That the notice of stoppage *in transitu* was not sufficient, being given to the Grand Trunk Railway Company.

The defendants called witnesses to show the solvency of Henderson & M'Intosh in March, April, and May 1864, and they did not suspend until the spring of 1865.

The learned judge overruled the objections *pro formâ*, reserving leave to the defendants to move to enter a nonsuit, and left the case to the jury on the question of the solvency of Henderson & M'Intosh at the time of the notice to stop the goods.

The jury said they were then insolvent, and found for the plaintiffs \$366.

Galt, Q.C., obtained a rule calling on the plaintiffs to show cause why a nonsuit should not be entered on the grounds taken at the trial; or for a new trial, no evidence of any act of insolvency having been given so as to justify the plaintiffs in stopping *in transitu* the goods for the conversion of which this action is brought. He cited Blackburn on Contract of Sale, 339.

M. C. Cameron, Q.C., showed cause.

DRAPER, C.J., delivered the judgment of the court.

As respects the motion for nonsuit, we take it to be clearly settled that by the sale to Henderson & M'Intosh, and the delivery of the goods sold to the Grand Trunk Railway Company to be conveyed to the purchasers, the goods from the moment of that delivery were at the purchasers' risk, and that the plaintiffs had no further power or control over them unless Henderson & M'Intosh became insolvent, when the plaintiffs would have the right of stoppage *in tran-*

situ (Browne v. Hare, 4 H. & N. 830). And so far as the nonsuit is concerned, the verdict of the jury shows that these parties were insolvent. The plaintiffs therefore had the right of stoppage *in transitu*. There is no doubt that the Grand Trunk Railway Company had notice, and attached to the admissions we find a paper (though it is not mentioned in the learned judge's notes) purporting to be sent by that company to these defendants, in these words: "Henderson & M'Intosh's goods. Please detain these goods until further advised"—bearing date the 25th of April 1864. The evidence of the first witness is however in itself ample to show the defendants had notice of the stoppage *in transitu*.

In *Clay v. Harrison* (10 B. & C. 99), Lord Tenterden says the point whether the stoppage *in transitu* revested the property in the vendors has not been expressly decided; and his judgment was founded on the peculiar circumstances of that case. In *Wentworth v. Outhwaite* (10 M. & W. 452), however, a majority of the Court of Exchequer thought (without deciding) that the stoppage only entitles the vendor to hold the goods from the purchaser until paid; and the American authorities (according to a note to that case in the reprint) agree in this. *Martindale v. Smith* (1 Q. B. 389) appears to affirm the principle, for it decides that though the unpaid vendor has a lien on the goods as long as they are in his possession (and stoppage *in transitu* gives the same lien), yet non-payment by the vendee on the day stipulated does not rescind the sale, and by a subsequent tender of the price the vendee will acquire a right to the possession of and may maintain trover for the goods.

But this right in the vendor to withhold the goods from his vendee, who by payment would have an immediate right to the possession, as being already the owner by sale and delivery to the carrier, is a very different thing from the right of property and of possession which is asserted in the action of trover, which in my humble judgment will not lie upon the facts in evidence.

We must not be understood as giving any support to the notion that the defendants were right in delivering these goods to Henderson & M'Intosh. If these latter tender-

ing the freight had demanded the goods, threatening a suit, we have no doubt the defendants might have got an interpleader issue; and while they held the goods on the notice of stoppage, they might have warehoused them for the plaintiffs and charged rent.

We think the rule for a nonsuit should be made absolute.

We may refer to the recent case of *Schotsmann v. The Lancashire and Yorkshire Railway Company* (13 L. T. N. S. 733), which seems to be rested on the same principles as we have followed. The case of *Bolton v. The Same Company* (Ib. 764) may also be looked at with advantage. See also *VanCasteel v. Booker* (2 Ex. 702), *Turner v. Trustees of the Liverpool Docks* (6 Ex. 543).

Rule absolute.

M'PHEE v. WILSON.

Agreement—Liquidated Damages or Penalty.

On an agreement to deliver a certain number of withes and traverses of specified qualities and dimensions for binding and rafting timber by the 1st of March, and to pay \$4 "as liquidated and assessed damages, recoverable by action of covenant or deductible from the contract money hereinafter mentioned, for each and every day after the said 1st of March that the said withes and traverses, or any part thereof, shall or may be undelivered as aforesaid." *Held*, that the sum named must be treated as liquidated damages, not a penalty; and the stipulation for payment daily of a small sum, instead of one payment large in amount, was regarded as tending strongly to that conclusion.

The plaintiff being entitled to recover on the count claiming these damages, *Held*, that there must be a verdict for the defendant on the other count, on which the jury had assessed the actual damage sustained.

THE first count stated that by deed, dated 3rd August 1864, made between the plaintiff and one Murray, Murray covenanted to deliver to the plaintiff 4641 withes for binding timber, of specified quality and dimensions, and 101 traverses of specified qualities and dimensions, for rafting timber, to be delivered on the 1st of March 1865; and that defendant by deed of the same date covenanted with the plaintiff that Murray would perform and pay any liquidated damages or any matter or thing by him covenanted to be performed and paid. *Breach*, that Murray did not deliver the said withes and traverses, but wholly neglected so to do.

The second count stated a similar deed made between Murray and the plaintiff, containing a covenant that in the event of Murray not delivering the withes and traverses on or before the said 1st day of March, he would pay the plaintiff \$4 "as liquidated and assessed damages, recoverable by action of covenant, or deductable from the contract money hereinafter mentioned, for each and every day after the said 1st of March next that the said withes and traverses, or any part thereof, shall or may be undelivered as aforesaid," and that the defendant by deed of the same date covenanted with the plaintiff as stated in the same count. *Breach*, that Murray did not deliver the withes and traverses on the 1st day of March, but the same, or a part, were undelivered at the commencement of this suit, being the space of forty-five days, nor did Murray or the defendant pay the sum of \$4 for each day, but wholly failed.

The plaintiff by the deed covenanted to pay Murray \$29 50c. after the withes had been culled and inspected.

Plea to each count, that Murray did deliver.

The trial took place at Goderich, in October 1865, before *Richards, C.J.*

The question in dispute before the jury was on the quality of the withes delivered, upon which there was a good deal of contradictory evidence ; and the jury upon the first count, wherein the breach alleged did not touch the question of the time of delivery, found for the plaintiff, with \$15 damages. It was admitted that all the traverses but one had been delivered, and 2140 withes.

Upon the second count, the question raised was whether the \$4 *per diem* after the 1st of March was a penalty for non-performance, or was to be treated as damages liquidated by the parties themselves.

It was agreed that the plaintiff should have leave to move to enter a verdict for him on this count for any sum not to exceed \$160, if the court should be of opinion that the amount fixed by the contract was liquidated damages. In case the court adopted this conclusion, then the verdict rendered on the first count was to be reduced to one

shilling, or to be entered for the defendant, as the court might decide; and it was further agreed that the plaintiff should move.

John Paterson, in Michaelmas term, obtained a rule calling on the defendant to show cause why the verdict should not be entered on the second count for the plaintiff for \$160, or such lesser sum as to the court might seem proper, the plaintiff consenting that if the court should decide in his favour on the second count, the verdict should be reduced to one shilling, or be entered for the defendant on the first count, as the court might direct.

During this term *C. Robinson, Q.C.*, showed cause, citing *Betts v. Burch*, 4 H. & N. 506; *Gilmour v. Hall*, 10 U. C. R. 309; *Brown v. Taggart*, Ib. 183; *Gaskin v. Wales*, 9 C. P. 314; *Fisher v. Berry*, 16 C. P. 23; *Boys v. Ancell*, 5 Bing. N. C. 390; *Horner v. Flintoff*, 9 M. & W. 678; *Atkyns v. Kinnier*, 4 Ex. 776, 785 note, Am. Ed.; *Galsworthy v. Strutt*, 1 Ex. 659; *Reynolds v. Bridge*, 6 E. & B. 528; *Fletcher v. Dyche*, 2 T. R. 36; *Sainter v. Ferguson*, 7 C. B. 727; *Kemble v. Farren*, 6 Bing. 141; *Dimech v. Corlett*, 12 Moo. P. C. C. 220; Add. Cont. 1072, 1076; *White & Tudor*, Lea. Cas. vol. ii. p. 469 *et seq.*

Robert A. Harrison supported the rule. He cited *Sainter v. Ferguson*, 7 C. B. 730; *Mercer v. Irving*, E. B. & E. 563; *Duckworth v. Allison*, 1 M. & W. 412; *Fisher v. Berry*, 16 C. P. 23; *Rutherford v. Stovel*, 12 C. P. 18, per *Hagarty, J.*, which he said was an *obiter dictum*; *Astley v. Weldon*, 2 B. & P. 351; *Hitchcock v. Coker*, 6 A. & E. 438; *Legge v. Harlock*, 12 Q. B. 1015; *Seeger v. Duthie*, 8 C. B. N. S. 45; *Green v. Price*, 13 M. & W. 695; *Reilly v. Jones*, 1 Bing. 302; *Ainslie v. Chapman*, 5 U. C. R. 313; *M'Lean v. Tinsley*, 7 U. C. R. 40.

Hagarty, J., mentioned *Rawlinson v. Clarke*, 14 M. & W. 187.

DRAPER, C.J., delivered the judgment of the court.

There are many decisions reported bearing directly on the question before us. "Perhaps they are a little conflicting," as *Crompton, J.*, observes in *Reynolds v. Bridge* (6 E. & B. 545); "not perhaps all of them strictly reconcilable with each other" (per *Coleridge, J.*, in *Dimech v. Corlett*, 12 Moo. P. C. C. 229). Both these learned judges, though not using the same words, appear to arrive at the same conclusion—that the intention of the parties, to be collected from the language they have used, should prevail, and that no case goes the length of deciding that the courts will not follow what they consider to be the meaning of the parties. *Coleridge, J. (ub. sup.)*, lays it down that "the mere use of the term 'penalty,' or 'liquidated damages,' does not determine that intention, but, like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument," adding that "if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation applying generally to a breach of all or any of them was intended to be a penalty, and not in the way of liquidated damages."

The safest guide is the intention of the parties to be collected from the whole instrument, not being fettered by particular words or expressions. Nothing can be plainer in expression than when parties say such a sum shall be liquidated damages and not a penalty, and in 1823 two learned judges said there was no case in which the parties had used the words "liquidated damages," and the court had not held that the defendant was bound to pay the full sum mentioned (*Reilly v. Jones*, 1 Bing. 302). That language would not be used now. So it was argued here that the words "assessed" and "deductable from the contract money" should determine this case. We admit their weight as indicating the intention of the parties, but we cannot think them stronger than "by way of liquidated damages and not of penalty."

The contract in this case requires the delivery of several thousand withes, each of them of very small value, and of more than one hundred traverses, all of which were to be delivered by a fixed day, and in default \$4 were to be paid by the contractor as liquidated and assessed damages, "recoverable by action of covenant, or deductable from the contract money for each and every day that the withes and traverses, or any part thereof, might remain undelivered."

For the defendant it was urged that, because it would be unreasonable that the defendant should pay \$4 a day for an undefined period for the non-delivery of a single withe, worth perhaps two cents, the sum thus named must be considered to be a penalty. The language of *Alderson, B.*, in *Galsworthy v. Strutt* (1 Ex. 666) favours this contention: "Where there are many and different stipulations in an agreement, the breach of any of which gives rise to a definite amount of damage, and for which a disproportionate sum is annexed, it is not reasonable to hold that the parties intended the whole amount to be paid."

In my opinion, however, we must go further to ascertain the real intention of the parties. The plaintiff wanted these withes and traverses in order to raft timber; and it may be reasonably assumed that to him it was of considerable importance not simply to get them, but to get them at a time when the rafting and forwarding his timber to market would depend on his having them. He therefore stipulated to have them by a certain day; and as delay would be injurious to him, he insisted that the defendant should pay damages for *each day* that the delivery was delayed. To this the defendant agreed; and it appears to us the intention of the parties, as evinced by the language used, the nature of the provision, and the object plainly indicated in the instrument, was that a sum of \$4 should be the daily damages to be paid on a breach of the contract. The continuation from day to day of the liability to pay this small sum tends, in my judgment, very strongly to this conclusion; as if it were intended simply to secure performance by a penalty, a single sum and large in amount would most probably have been named,

since it would have been the limit beyond which no damages were recoverable.

We think a verdict should be entered for the plaintiff for \$160 on the second count, and that a verdict should be entered for the defendant on the first count. The plaintiff cannot recover upon both ; for the breach on the first constitutes a part of the breach on the second, for which the plaintiff recovers the amount of damages liquidated and assessed by the contract.

It has been urged that, the damages accruing day by day, the plaintiff may have an interest in deferring his action for the breach of contract, as he will thus increase the damages to which he may lay claim until they will be extravagantly disproportioned to the value of the act or thing the performance or delivery of which was contracted for by the defendant. This argument assumes that the contract all that time remains open, for if it comes to an end (as by suing for the breach of it) the claim for further damages will come to an end also. But so long as the contract is open the defendant may stop the incurring further damage by fulfilling his undertaking, for it is the daily continuance of the breach which subjects him to the daily payment. And then the court must be governed by the contract which the parties have entered into. If that contract in unmistakable terms stipulates and provides for the payment of liquidated damages, daily or not, we do not think we can estimate whether it is a foolish or most costly bargain, and therefore so construe it as to give it a different effect from what the parties intended when they entered into it, or say, when we perceive the result, that it is an agreement secured by a penalty because the length of the defendant's own neglect and omission to fulfil his part has increased the amount of damages, if they be held liquidated damages, to an apparently ruinous amount.

Rule absolute.

IN THE MATTER OF PRINCE AND THE CORPORATION OF THE
CITY OF TORONTO.

Police force—Salaries—C. S. U. C. ch. 54, sec. 402.

Under sec. 402 of C. S. U. C. ch. 54, it is for the city council, not the commissioners of police, to determine the remuneration to be paid to the police force.

Where, therefore, the commissioners, thinking the salary of the chief constable fixed by the council insufficient, had estimated a higher rate, the court refused a mandamus to the city to pay it.

In Easter term *J. H. Cameron, Q.C.*, obtained a rule calling on the corporation to show cause, on the first day of the following term, why a peremptory writ of mandamus should not be issued, commanding the corporation to pay to William S. Prince the sum of \$300, being the balance of his salary as chief constable of the city as estimated by the board of police commissioners of the city for the year 1864, and required to be paid by the said corporation to the said W. S. Prince as such chief constable.

Late in this term *M'Bride* showed cause, and *J. H. Cameron, Q.C.*, supported the rule.

DRAPER, C.J., delivered the judgment of the court.

The Municipal Institutions Act of Upper Canada, sec. 396, creates a board of commissioners of police in every city. The police force is to consist of a chief constable and as many constables and other officers and assistants as the council from time to time deems necessary, but not less in number than the board reports to be absolutely required (sec. 398). The members of such force are to be appointed by, and hold their offices at the pleasure of, the board (sec. 399). The board is to make regulations for the government of the force (sec. 400). The constables are to obey all lawful directions of, and to be subject to the government of, the board, and their duties are pointed out (sec. 401). "The council shall fix and pay a reasonable remuneration for and to the respective members of the force, and shall provide and pay for all such offices, watch-houses, watch-boxes, arms, accoutrements, clothing, and other necessities as the board

may from time to time deem requisite and require for the accommodation and use of the force" (sec. 402).

The whole question arises on this last section. The first part of it relates to the remuneration of the members of the police force, and imposes a duty of a twofold character on the council: 1st, To fix, and next to pay, a reasonable remuneration. If the council wholly neglected or refused to fix any remuneration, or fixed an amount so small as to be manifestly illusory, so that such persons as the board of commissioners appointed would not serve for it, there might be a remedy; and if they had fixed a reasonable remuneration, but refused or neglected to pay the force according to the amount fixed, there would also be a remedy. But in the present case they have fixed a remuneration which they deem reasonable, and they have paid the amount so fixed. But the board of commissioners think the remuneration insufficient, and they have estimated a higher rate, and their chairman has in writing ordered the city chamberlain to pay the difference between the amount fixed by the council and that which they have estimated as proper.

This court has in our opinion no power or authority to interpose upon the facts appearing. Without adopting any conclusion as to what would be a proper remuneration, we cannot hold that the sum fixed is so much below what should be paid as to make the act of fixing upon it evidence of an intention to evade the duty imposed by the legislature. Nor can we recognise any authority in the board of commissioners to establish the sums to be paid to the members of the police force. We think it highly probable that they have the best opportunities of judging of the proper remuneration, as they must be assumed to be the proper judges of the qualification of each officer, but the legislature has not conferred that power on them, but on the council.

In our opinion this rule must be discharged.

Rule discharged.

WARNE v. COULTER.

Taxes—Non-resident lands—27 Vict. ch. 19.

A lot of land being in arrear for taxes for six years up to 1859 inclusive, during which it had been assessed as "non-resident" land, was duly returned in 1865, under 27 Vict. ch. 19, as occupied by the plaintiff, who had become tenant of it on the 1st of April of that year. These taxes were placed upon the collector's roll, and in order to satisfy them he seized the plaintiff's goods *upon another lot* in the same township. *Held*, that such seizure was unauthorized.

REPLEVIN, for goods taken upon the lot of land on which the plaintiff resided in concession "B" of the township of Etobicoke, in the county of York.

Avowry.—That the inhabitants for the time being of the township of Etobicoke, in the county of York, one of the United Counties of York and Peel, are and have been before and since the year 1853 a body corporate, having through the council thereof for each year authority by law to impose taxes on lands situate in the said township; that all that part of lot number 21 in concession "C" of the said township, lying west of Scarlett's Road, is and was before and since the year 1853 a parcel of land situate therein, patented by the Crown, subject to municipal and other taxes; that during the years 1854, 1855, 1856, 1857, 1858, and 1859 the said parcel of land was duly assessed, and the corporation of the township of Etobicoke, by the council thereof for the said years respectively, by by-laws in that behalf duly imposed on the said parcel of land certain taxes for each of the said years; that none of the said taxes on or in behalf of said parcel of land were ever paid; that the arrears of said taxes on the said parcel of land, together with county rates according to the statute in that behalf duly imposed, and ten per cent. on arrears added by the county treasurer as hereinafter mentioned, according to the provisions of the said statute, in the aggregate made a large sum of money, to wit, \$182.63; that during each and all of the years aforesaid the said parcel of land was unoccupied, and duly assessed as land of a "non-resident;" that when the assessment roll of said township for each of the said years had been finally revised and corrected according to the provisions of the said statute, the clerk of the said township did without delay in each of the said years transmit to the county clerk a certified copy thereof, showing the said parcel of land assessed as aforesaid, and did also in each of said years duly transmit to the county treasurer a certified copy of the collector's rolls of said township for each of said years respectively, as far as the same related to the lands of

“non-residents;” that the said county treasurer in each of the said years kept books, in which he duly entered under the heading of every local municipality (including the said township of Etobicoke), in his United Counties aforesaid, all the lands in the municipality (including said parcel of land), and on which it appeared from the returns made to him by the clerk that there were any taxes unpaid, and the amounts so due, and did on the 1st day of May in each and every of the said years duly complete and balance his books, by entering against every parcel of land the arrears, if any, due at the last settlement, and the taxes of the preceding year which remained unpaid, and ascertained and entered therein the total amount of arrears chargeable upon the land at that date; that thereupon the collection of the said arrears of taxes belonged to the treasurer of the said United Counties alone, subject to the provisions hereinafter mentioned; that the said last-mentioned treasurer afterwards, according to the provisions of the said statute, duly added to said arrears ten per cent. on the amount thereof; that the said arrears for more than five years thereafter remained wholly unpaid and unsatisfied; that the treasurer of the said United Counties afterwards, during the month of January 1865, and after the passing of the statute 27 Vict. ch. 19, furnished to the clerk of the township of Etobicoke a list of all the lands patented or described for patent in the township of Etobicoke, including the said parcel of land, in respect of which any taxes had been in arrears for five years preceding the said 1st day of January; that the clerk of the said township of Etobicoke afterwards delivered to the assessor of the said township for the year 1865, as soon as the said assessor was appointed, a copy of the said list; that thereupon it became and was the duty of the said assessor to ascertain if any of the lots or parcels of land contained in the said list were occupied, and to notify the occupants and the owners thereof, if known, of the amount of taxes due on each such lot or parcel of land, and enter in a column (reserved for the purpose) the words “occupied and parties notified,” or “not occupied and parties notified” (as the case might be); that the said plaintiff was before and at the time of the delivery of the said list to the said assessor occupant of the parcel of land aforesaid; that the said assessor afterwards, and before the return of the said list as hereinafter mentioned, ascertained the fact that the plaintiff was occupant of said parcel of land as before mentioned, and duly assessed him as such; that the said assessor afterwards duly notified the plaintiff so being such occupant, and also notified the owner of said parcel of land of the amount

of taxes due thereon, and entered in the column (reserved for the purpose) the words "occupied and parties notified;" that the said list containing said parcel of land was duly signed by the said assessor, and attached thereto was a certificate, signed by the said assessor and verified by oath, in the form required by said last-mentioned statute; that said list so signed and verified was afterwards, with the assessment rolls of said township for the year 1865, by the said assessor duly returned to the clerk of the said township; that the clerk of the said township afterwards examined the roll returned to him as aforesaid, and ascertained that the said parcel of land embraced in the said list last received by him from the treasurer of the United Counties of York and Peel was entered upon the roll for the said year 1865 as then occupied; that the said clerk afterwards, to wit, on or before the 15th of May 1865, furnished to the said treasurer a list of the several lands, including said parcel of land, appearing on the assessment roll to have become occupied as aforesaid, and the said treasurer afterwards, to wit, on or before the 1st of July 1865, returned to the clerk of the said township an account of all arrears of taxes due in respect of such occupied lands, including the said parcel of land; that during the year 1865 defendant was the duly appointed collector of taxes in and for ward No. 3 of the said township of Etobicoke, in which ward said parcel of land is situate; that the clerk of the said township afterwards, in making out the collector's roll of the said township for the said year 1865, duly added and included the arrears of taxes aforesaid in respect of said parcel of land, to wit, \$182-63, to the taxes assessed against the same for the year 1865, and duly delivered the said roll with the addition aforesaid to the defendant as such collector aforesaid, and thereupon it became and was the duty of defendant as such collector to collect such arrears in the same manner and subject to the same conditions as all other taxes entered upon the collector's roll for said last-mentioned year; that thereupon defendant, so being such collector, proceeded to collect the said arrears of taxes, and for that purpose called at least once on the plaintiff (being the person taxed) at his usual residence in the said township, and demanded payment from the plaintiff of said arrears of taxes, and that the plaintiff neglected to pay such arrears of taxes for the space of more than fourteen days after such demand—whereupon the defendant, so being such collector as aforesaid and the proper officer in that behalf, seized and took at the said township of Etobicoke the goods and chattels in the said declaration mentioned, being the goods and chattels of the plaintiff (being the person who

ought to pay the said arrears of taxes as therein mentioned), and being goods and chattels at the time in plaintiff's possession in said township of Etobicoke, and detained the same for a distress for the arrears of said taxes, as he lawfully might for the causes aforesaid.

Plea to the avowry—That the plaintiff never was the occupant or tenant of that part of lot No. 21 in concession C of the township of Etobicoke, in the said avowry mentioned, or in any way interested therein, until the 1st of April 1865, after all the arrears of taxes in the said plea mentioned had accrued due; that he, the said plaintiff, although in possession of and cultivating the said lot as a tenant before and at the time of the delivery of the list in said avowry mentioned to the assessor, and thence up to and at the time of said seizure, under a lease from one Marianne Arnold, the owner thereof, to him the said plaintiff, executed on the said 1st day of April 1865, had never lived or resided thereon, but upon lot No. 21, in concession B of the said township of Etobicoke; and that the goods in the declaration and in the said avowry mentioned were seized for such arrears, not upon the said lot No. 21 in concession C, in respect of which the said taxes accrued due, but upon the said lot No. 21 in concession B, on which the said plaintiff was resident at the time of such seizure.

Demurrer and joinder, raising substantially the question, whether under the facts admitted the plaintiff's goods were liable.

Robert A. Harrison, for the demurrer. *C. Robinson, Q.C.*, contra.—*Municipality of Berlin v. Grange*, 5 C. P. 211 *Holcomb v. Shaw*, 22 U. C. R. 92; *Fraser v. Page*, 18 U. C. R. 337, were referred to on the argument.

The sections of the statutes bearing upon the question are cited in the judgment.

HAGARTY, J., delivered the judgment of the court.

The case turns upon the construction to be given to the Act of 1863 as to "non-resident" lands.

This statute, after giving directions how the township clerk is to be furnished with a list of non-resident lands five years in arrear for taxes, and how the assessor to any such list is to return if any and which of the lands are occupied,

and notify the occupants and owners, directs that "the clerk of each municipality shall, in making out the collector's roll of the year, add and include such arrears of taxes to the taxes assessed against such occupied lands for the then current year, and such arrears shall be collected by the collectors of the municipalities, in the same manner and subject to the same conditions as all other taxes entered upon the collector's roll."

The Act contains no special provision for the disposition of the moneys levied for arrears; but section 5 directs that the county treasurer shall not issue his warrant for the sale of any lands returned to him as occupied under section 3 of the Act.

The statute seems, in very express words, to direct that these arrears are to be collected in the same manner as all the other taxes on the roll. We must now see what that "same manner" is.

Under "The Assessment Act," Consol. Stat. U. C. ch. 55, land is assessable against the occupant if the owner were not resident or unknown; but if unoccupied and the owner non-resident, then it is returned as non-resident land under section 24. When assessed against both owner and occupant, the taxes are recoverable from either, or from any future owner or occupant.

By section 89 it is provided how taxes are to be entered on the collector's roll, the names of persons assessed, number of lot, any amount for county rate in a separate column, in another the local municipal rates, and in separate columns any special rate for schools, etc.

Section 96 allows the collector to levy the taxes "by distress of the goods and chattels of the person who ought to pay the same, or of any goods or chattels in his possession wherever the same may be found within the county in which the local municipality lies."

By section 97 in case of the land of non-residents the collector may distrain "any goods and chattels which he may find upon the land."

If the amount of taxes be not levied on non-resident lands, return is made to the county treasurer, to whom the

future collection belongs; and section 122 enables him, whenever satisfied that there is distress upon non-resident lands in arrear for taxes, to authorize the sheriff by warrant to levy "upon any goods and chattels found upon the land."

Section 134 enables the sheriff to distrain goods on the land after the warrant for sale comes to his hand.

To the time of the passing of the Act of 1863 it seems clear that as this land was "non-resident," only the chattels actually on the land were liable to distress. The avowry expressly states it is to be non-resident land up to 1865. The case turns upon the effect of the new Act—whether it makes the plaintiff's goods, he being merely the tenant and occupant, in any part of the municipality, and off the land, liable for arrears accrued before his tenancy.

The Act of 1863 says, "For the greater protection of persons owning non-resident lands in Upper Canada, and also for the more sure collection of the taxes thereon," be it enacted, etc. Except in this place and in the title, the words "non-resident" do not occur throughout the Act. It speaks generally of land five years in arrear. It provides for the ascertaining of any occupations of the land; and as soon as an occupation is found, then the arrears are to be put into the collector's roll; they are to be "added and included to the taxes assessed for the current year." No express direction is given as to keeping them separate from the current taxes.

Down to 1865, when the plaintiff became tenant, the land was simply assessed as non-resident land. In 1865 the owner was apparently known, as the avowry states that he was duly notified, and the plaintiff was assessed as occupant. It does not appear that the owner had ever desired to be entered as owner.

We have, therefore, an occupant becoming such for the first time in 1865, after all arrears accrued. These arrears are added to his current assessment for 1865. They are to be collected "in the same manner and subject to the same conditions as all other taxes entered upon the collector's roll."

We think they could certainly be collected by distress of any chattels on the land. The plaintiff's taxes for the

current year 1865 could be collected by seizure of the goods found anywhere in Etobicoke, or indeed within the county. This is done under section 96, "*in case any person neglects to pay his taxes,*" the collector may levy "by distress of the goods and chattels of the person who ought to pay the same," wherever found in the county.

The next section provides that in case of lands of non-residents distress can only be made upon the land itself.

The Act of 1863 places the arrears on the same footing as taxes assessed in the ordinary way against an occupant. This, however, is apparently only as to the manner of their collection; it does not declare any personal liability against an occupant. The taxes for 1865 assessed on the plaintiff as occupant were clearly "his taxes," and he was the person "who ought to pay the same," under section 96; and see section 24 as to the recourse being saved.

In a popular sense these arrears certainly never were his, nor ought he to pay them. We think the words must be very clear which will render him legally responsible.

For many years the legislature have held all property actually on the land of residents or non-residents liable for the taxes, and the arrears formed a gradually increasing lien, recoverable at any time by distress of goods on the land down to the ultimate sale of the land itself by the sheriff. It may well be doubted if the Act of 1863 meant to create any new individual liability, or intended to go beyond the creation of a simple machinery for effecting by the local assessors and collectors what could previously, with far greater difficulty and much less accuracy, be done by the county treasurer through the sheriff. (See sec. 122.)

It would seem the more reasonable construction that these arrears, whether kept separate from or included in the plaintiff's taxes for the current year, did not thereby become a charge against his property to be found anywhere within the County of York at any distance from the lands chargeable, and never having been on the same.

It may be just that any person bringing property on a lot in arrears for taxes for the purpose of cultivating or occupying the same, should incur the responsibility of making such

property liable for all arrears of taxes. He either knows or ought to know the law which has been in force for years. The land cannot be cleared of the burden, and everything upon it is equally bound. It is far different, however, with chattel property which belongs to the temporary occupant, and which may never have been within miles of the land or used for any purpose connected therewith.

We think we can allow full effect to the provisions of the Act of 1863 without doing the very serious injustice which the defendants' view of the law would render necessary.

M'Lean, C.J., in *Holcomb v. Shaw* (22 U. C. R. 100) expresses an opinion that taxes due by former occupants are not taxes which a future occupant "ought to pay" under section 96; but that case was decided before the Act of 1863.

Judgment for plaintiff on demurrer.

HENDERSON v. GESNER ET AL.

Promissory note—Stamps.

The plaintiff in September 1865 sued the maker of a promissory note, due in January 1865, payable to H. or bearer, and by H. indorsed to the plaintiff. Defendant pleaded that it was not duly stamped when the plaintiff became a party thereto, nor until it fell due; and the jury were directed that it was sufficient if the stamps were put on before action brought.

Held (reversing the judgment of the County Court), a misdirection, for the plaintiff became a party to the note by becoming the holder or indorsee, and was bound to stamp it then.

APPEAL from the County Court of the County of Kent.

The declaration was against Gesner, the maker of a note for \$170.86, dated 24th October 1864, payable to Henry Henderson, or bearer, three months after date; that Henderson indorsed the note to defendant Stewart, who indorsed it to the plaintiff.

The defendant Stewart, who alone defended, pleaded want of presentment and notice; and, 3, that he indorsed the note without value, to accommodate Gesner, and so indorsed before the issuing or delivery of the same to the plaintiff by Gesner, and the plaintiff became a party to it and accepted it so made and indorsed; but the said note had not at the

time it was so made and delivered to the plaintiff; and at the time when the plaintiff became a party thereto and accepted and received the same, the stamps required by law thereto affixed, impressed, or placed thereto, to wit, revenue stamps of the denomination of bill or note stamps to the value of six cents, nor were the same affixed thereto in double value as required by law, to wit, twelve cents in such stamps, by the plaintiff when he became the indorser thereof, nor till the note became due.

Issue was taken on these pleas.

The payee's name was the same as the plaintiff's, but no evidence of identity was given, so that it might be assumed that the plaintiff's interest in the note accrued after defendant Stewart's indorsement.

The notary swore that four three-cent stamps were put and obliterated on the note by the plaintiff before it became due; that the plaintiff put on two stamps shortly after the note was drawn, in October 1864, and two nine-cent stamps before the note fell due.

Defendant's son swore that the note attached to the notarial instrument was presented at his father's house to him, and there were no stamps on it then.

The learned judge directed the jury to find for the plaintiff if they found the stamps were put on before action brought; and they gave a verdict for the plaintiff.

After motion in term a rule for a new trial was discharged on the alleged authority of *Stephens v. Berry*, 15 C. P. 548.

The propriety of this direction was the only point raised on this appeal.

J. B. Read, for the appellant. *Kingstone*, contra.

HAGARTY, J., delivered the judgment of the court.

It would seem that no stamps were on this note when originally made.

The case seems governed by the words of 27 and 28 Vict. ch. 4, section 9, "Except that any subsequent party to such instrument or person paying the same, may at the time of his so paying or becoming a party thereto pay

such double duty by affixing," etc. etc., "and such instrument shall thereby become valid."

The Act of 1865, 29 Vict. ch. 4, which became law on the 18th of September 1865, and which it is enacted shall be construed as one Act with the preceding Act, in its fourth clause says: "No party to or holder of any note, draft, or bill of exchange shall incur any penalty by reason of the duty thereon not having been paid at the proper time and by the proper party or parties, provided that at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it; that he had no knowledge that they were not affixed at the proper time and by the proper party or parties; and that he pays such duty as soon as he acquires such knowledge; and any holder of such instrument may pay the duty thereon, and give it validity, under section 9 of the Act cited in the preamble, without becoming a party thereto."

The case of *Stephens v. Berry* was decided wholly on the Act of 1864. *Richards, C.J.*, says: "I think we are certainly bound to decide that when a person becomes the holder of an unstamped bill so as to sue and does sue on it, he must, to make it valid in his hands, have put the double stamp on it before commencing the action. Indeed, I personally take a much stronger view of the necessity of a holder protecting himself by the double stamp when the bill without it would be void. The holder, in my judgment, can only be considered safe when he puts on the proper stamp at the time he would in law be considered as having taken and accepted the bill as his own, or within a reasonable time thereafter."

This note matured in January 1865. The action seems to have been commenced in September following, and the trial was in December last.

The new Act imposed new duties from the 1st of January 1866, with certain directions as to obliterating stamps from and after the 1st of October 1865. The 4th section is silent as to time of operation, and the 5th directs its being construed as one Act with the previous one.

If we should read section 4 as part of or explanatory of section 9 of the former Act, there would be no room

to question the correctness of the learned Chief Justice's "personal" view.

But when the latter statute became law the note had been six months at least in the plaintiff's hands. He was then the holder of it, and the action was pending before the statute was passed.

By section 9 of the earlier Act the note was void if not duly stamped at its making, etc., except in the case of any subsequent party affixing the double stamp at the time of his becoming a party thereto. This note, therefore, if no subsequent party stamped it on becoming a party, was avoided. If the plaintiff has saved it by stamping, it must be because as a subsequent party he stamped it on becoming such party. He therefore became a party in some way, and no other way can be imagined than by becoming the holder or indorsee of the note. He did not become a party by merely bringing the action.

We therefore think the direction given to the jury cannot be upheld.

The statute would be completely defeated if the stamps could be affixed at any time before action commenced. Parties could hold notes and pass them from hand to hand and only affix stamps if legal proceedings became unavoidable.

If the fact really were, as is most probable, that the plaintiff is the payee and first indorser of the note, the time of his first connection with it is quite plain.

We think the appeal must be allowed, and that the rule for a new trial in the court below should be made absolute without costs.

Appeal allowed.

DECOW *v.* TAIT.

Slander—Misappropriation by trustee—C. S. C. ch. 92, sec. 51
—Trial de novo.

In slander the declaration commenced with an inducement that the plaintiff was a merchant carrying on business, and was also engaged in a public object, to wit, the construction of a public bridge over the river Thames, and was a trustee of large sums of money which he received for the construction of that bridge. Then followed six counts, the first four stating the words which follow to have been spoken of the plaintiff and of the moneys which came into his hands as a trustee as aforesaid: 1. "You have robbed the public of \$1500, and have been using it in your business for years." 2. "You know you have robbed the public and pocketed \$1500 of the funds of the M'Intosh Bridge Committee, and you have used it in your business for years. It is not the only money you have used in that way; you have made your money in that way." 3. "You have defrauded the public of \$1500 and pocketed the money, and have been using it in your business for years." 4. "Mr. Decow has \$1500 of the public money in his pocket, and is using it." The fifth count charged the following words to have been spoken as before, and also of and concerning the report of certain auditors as to the accounts in relation to the said bridge: "The auditors may make what kind of a report they like, but I can show before a court or any other place he has got that amount of money, and more too, and is using the money." The sixth count alleged these words as spoken of the plaintiff, and of large sums of money which had come into his hands as a trustee, and whereof he was a trustee for the building a certain public bridge; and as to \$1500 of the said money, "Mr. Decow has that amount, and is using it in his own business." Defendant pleaded not guilty only; and the jury gave a general verdict for \$400. On motion for a new trial, the substantial ground being that the verdict was general, while some of the counts were defective:—

Held, that if so the proper course would not be a new trial, but a trial *de novo*, which might be ordered on motion for a new trial; but

Held, that each count disclosed a sufficient cause of action, for in each the defendant was charged with a misdemeanour, within the Consol. Stat. C. ch. 92, sec. 51, and there was no plea denying that he was a trustee as alleged.

SLANDER.—The declaration commenced with an inducement that the plaintiff was a merchant carrying on business, etc., and was also, with other persons, engaged in a public object and purpose, to wit, the construction of a public bridge for the use of the public, over the river Thames, leading from the County of Elgin to the County of Middlesex, and was a trustee of large sums of money which he received for the construction of that bridge.

The first count charged that the defendant spoke concerning the plaintiff, and concerning the moneys which came to the plaintiff's hands as a trustee as aforesaid, these words: "You have robbed the public of \$1500, and have been using it in your business for years."

The second count charged that the defendant spoke concerning the plaintiff and concerning (as in the first) these

words: "You know you have robbed the public and pocketed \$1500 of the funds of the M'Intosh Bridge Committee, and you have used it in your business for years. It is not the only money you have used in that way; you have made your money in that way."

The third count charged that the defendant spoke concerning the plaintiff, and concerning, etc. (as before), these words: "You have defrauded the public of \$1500 and pocketed the money, and have been using it in your business for years."

The fourth count charged that the defendant spoke of and concerning the plaintiff (as before) these words: "Mr. Decow has \$1500 of the public money in his pocket, and is using it."

The fifth count charged that defendant spoke of and concerning the plaintiff (as before), and of and concerning the report of certain auditors as to the accounts in relation to the said bridge, these words: "The auditors may make what kind of a report they like, but I can show before a court or any other place he has got that amount of money, and more too, and is using the money."

The sixth count charged that defendant spoke of and concerning the plaintiff, and concerning large sums of money which had come to the plaintiff's hands as a trustee, and whereof he was a trustee for the building a certain public bridge, and as to \$1500 of the said money, these words: "Mr. Decow has that amount, and is using it in his own business."

The case was tried at St. Thomas, in October 1865, before *Richards, C.J.*

After the examination of numerous witnesses on both sides, and after a motion for nonsuit, on the ground that special damage was the gist of the action and was not proved as laid, had been refused, the learned Chief Justice directed the jury that the defendant, being a member of the committee for constructing the bridge and treasurer thereof, had a right, at any meeting for investigating the accounts, to state in good faith any matter that he believed to be true, though false in fact, with a view of having the matters inves-

tigated and the truth made known, not going beyond what was necessary for that purpose, but this privilege would not cover statements made on other occasions and for different purposes; and that there was evidence of his having made such statements when that privilege would not protect him, which he left to them; and they found for the plaintiff, damages \$400.

In Michaelmas term *M. C. Cameron, Q.C.*, obtained a rule, calling on the plaintiff to show cause why there should not be a new trial, the verdict being contrary to law and evidence, and being general, while some of the counts were defective; that no special damage was shown, and some of the counts do not charge an actionable slander without special damage; and because the occasion on which the words were used, if used, was privileged.

In the following term *Becher, Q.C.*, showed cause. He cited *Bac. Abr. Slander, B.*; *Gallwey v. Marshall*, 9 Ex. 298; *Alfred v. Farlow*, 8 Q. B. 854, 863; *Griffiths v. Lewis*, 8 Q. B. 841; *Hemmings v. Gasson*, E. B. & E. 349; *Black v. Alcock*, 12 C. P. 19.

M. C. Cameron, Q.C., contra, cited *Ferris v. Irwin*, 10 C. P. 116; *Regina v. Armstrong*, 20 U. C. R. 245; *Fellowes v. Hunter*, 20 U. C. R. 382.

DRAPER, C.J., delivered the judgment of the court.

The general ground taken in the rule, that the verdict is against law and evidence, is in part involved in the special grounds also taken; and as to matter of law it is wholly so involved. As to evidence, there was proof that the words charged in the declaration above were spoken, and this proof was submitted to the jury, with a charge to which no exception was taken. It was objected at the trial that the plaintiff should be nonsuited, because no special damage was proved. The learned Chief Justice refused to nonsuit, pointing out that no such proof was necessary as to some of the counts; and he was not asked by either party to direct as to any particular count or counts that it was not sustainable without such proof, nor was any objection taken to the charge for the

want of such direction, nor is misdirection or non-direction complained of in this rule.

The declaration contains a general averment of damage to the plaintiff in his trade and business, and that divers of his creditors did in consequence of the slander press him for payment, and put him to costs, of which there was no specific proof.

The Consolidated Statute of Canada, ch. 92, sec. 51, enacts that "if any person being a trustee of any property for the benefit, either wholly or partially, of some other person, or for any public or charitable purpose, does, with intent to defraud, convert or appropriate the same, or any part thereof, to or for his own use or purposes," he shall be guilty of a misdemeanour. There is no plea putting in issue the prefatory matter in the declaration as to the plaintiff being such a trustee, and the plea of not guilty does not operate as a denial of this part of the inducement. No objection was taken at the trial as to the insufficiency of the evidence as to this matter, nor that the plaintiff was not a trustee within the meaning of this enactment. If there had been, any such objection might have been met, and the deficiency, if any, supplied.

We do not think, therefore, we are called upon to interfere on the questions raised in regard to evidence.

Whether the occasion on which some of the words were spoken was privileged or not, is a question which hardly arises now after the direction which was given to the jury; and we may properly assume that the words were spoken, and on an occasion not privileged; or rather that the jury have so meant to decide upon the evidence and charge.

It appears to us, therefore, that the only substantial matter of the rule is the objection that the verdict is general, and the declaration contains defective counts.

But this, in our opinion, is not a case calling for our interference by granting a new trial. If we interfere at all it would rather be by granting a trial *de novo*.

The case of *Leach v. Thomas* (2 M. & W. 427) affords a guide in this respect. There it was held that if general damages are given on a declaration in which several breaches

are assigned, one of which is bad, the court will grant a *venire de novo*; and among several authorities referred to there is the case of *Day v. Robinson* (1 A. & E. 554), which, assuming for the argument's sake that there are defective counts in this declaration, is extremely like the present case, and shows the course proper to be followed; and a similar view was adopted in *Empson v. Griffin* (11 A. & E. 186). In both those cases a *venire de novo* was ordered. Both were decided before the Common Law Procedure Act, 1852, was passed in England, by which (section 104) the writs of *venire facias juratores* were, with other jury process, abolished, as they all were in most cases by our Jury Act, Consol. Stat. U. C. ch. 31, sec. 72. A trial *de novo*, which since these statutes has become the substitute for a *venire de novo*, differs materially from the granting a new trial; for, as is pointed out in *Chit. Arch. Pr.*, 9th ed., vol. ii. ch. 29, it is granted for some defect appearing upon the face of the record, while a new trial is granted for matter entirely extrinsic. Where the former is granted the party ultimately succeeding is only entitled to the costs of the last trial, and neither party pays to the other the costs of the abortive trial (*Lickbarrow v. Mason*, 6 T. R. 131).

We must, therefore, consider whether any of the counts are so defective that the plaintiff cannot legally recover upon it or them.

In none of the counts are the words charged to be spoken of the plaintiff as a merchant, or concerning his business in that character, nor do we perceive the object of that prefatory statement. The words laid in the first count are said to have been spoken of him as a trustee, and there is a prefatory statement that he was a trustee of divers large sums of money, which he received for the purpose of constructing a public bridge and highway for the use of the public, which is in express terms declared to be a public object and purpose. We are not now dealing with the proof necessary to make out this statement, but whether the allegations which follow, taken in connection with it, show a criminal charge made by the defendant against the plaintiff. Now the words used, so connected, and explained by the innuendo seem to us

beyond all question to charge the plaintiff with having committed the misdemeanour defined by the enactment above set forth.

And so does each of the succeeding counts, though we felt some doubt upon the fifth; but considering the judgment of *Lord Denman* in *Griffiths v. Lewis* (8 Q. B. 850, 851) as to the effect of the innuendo in that case upon words capable of a non-injurious, and therefore non-actionable meaning, we have arrived at the conclusion that each count discloses a sufficient cause of action.

We rest upon the broad ground that in each there is a charge made by the defendant that the plaintiff has committed a misdemeanour. If so, the defendant is not entitled to a trial *de novo*. We have already stated why we think we should not interfere to grant a new trial upon any ground extrinsic to the record.

The course of granting a trial *de novo* seems more usually adapted to cases in which there has been an application to arrest the judgment, or where the judgment of the court upon the verdict has been reviewed upon writ of error. We do not see that it might not be taken upon a motion for a new trial, and we have therefore considered it.

We think the rule should be discharged.

Rule discharged.

PRENDERGAST v. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

R. W. Co.—Injury by fire—Limitation—C. S. C. ch. 66, sec. 83.

In an action against a railway company for so negligently managing a fire which had begun upon their track that it extended to the plaintiff's land adjoining—*Held*, that "The Railway Act," sec. 83, limiting suits to six months after the damage sustained, did not apply, the injury charged being at common law, by one proprietor of land against another, independent of any user of the railway.

THE second count of the declaration alleged that the plaintiff, before and at the time of the committing by the defendants of the grievances hereinafter in this count mentioned, was possessed of a certain farm or lot of land in the township of Pittsburgh (describing it), contiguous and adja-

cent to the defendants' line of railway; and the plaintiff was also possessed of a large quantity of trees and standing timber growing thereon, and of a large quantity of cordwood and railroad ties lying and being on the said lot, and of certain fences enclosing the same, and of certain grass and pasturage then growing and being on the said lot. And the defendants were possessed of a certain line of railway, to wit, the Grand Trunk Railway of Canada, running in and through the said township of Pittsburgh, and adjacent to the said lot of the plaintiff; and thereupon it became and was the duty of the defendants not to commit the grievances hereinafter mentioned. Yet the defendants, well knowing the premises, not regarding their duty, by their servants and agents wrongfully permitted to remain in and upon the said track of the said railway, and near the close of the said plaintiff, a certain fire in a careless, negligent, and improper manner, and at a time when by reason of the state of the wind and weather it was dangerous and improper so to do; so that by and through the negligence, improper conduct, and carelessness of the defendants, their said servants and agents, and for want of due and proper care and caution on their part, the said fire extended itself from and out of the said track of the said railway into and upon the close of the plaintiff, and into and upon the said trees, standing timber, cordwood, railroad ties, fences, grass, and pasturage, then growing and being thereon, and the same thereby then became ignited and caught fire, and were then respectively burned, consumed, and destroyed; that is to say, twenty acres of the soil of the said lot of the plaintiff, 1000 pieces of timber, etc.

At the trial at Kingston, before *Gwynne, Q.C.*, sitting for *Hagarty, J.*, evidence was given of the fire being seen in a stump on the track just after a train had passed, which spread rapidly into the plaintiff's land. Some of the defendants' servants tried to stop it, but without success. Several other fires seemed to have broken out on the same day along the line, and the defendants' servants were hard pressed working at different points trying to prevent its spreading.

It was objected that the action was too late, as six months had elapsed under section 83 of "The Railway Act." The learned Queen's Counsel decided that the clause did not apply to such a case. It was also objected that there was no evidence of carelessness on the defendants' part, or that they caused the fire. A great deal of evidence was offered, and the jury found for the plaintiff on this count, and \$125 damages, on the ground of negligence in preventing the fire from spreading, acquitting them of neglect in making the fire.

M. C. Cameron, Q.C., obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection, renewing the objections taken at the trial. He cited *Vaughan v. Taff Vale R. W. Co.*, 3 H. & N. 743, S. C. in appeal, 5 H. & N. 679; *Add. Torts*, 863; *Easton v. Wald*, 19 U. C. R. 586.

S. Richards, Q.C., showed cause, citing *Add. Torts*, 208, 210; *Fremantle v. London and N. W. R. W. Co.*, 10 C. B. N. S. 89; *Whitehouse v. Fellowes*, *Ib.* 765.

HAGARTY, J., delivered the judgment of the court.

The words of the 83rd section are, "All suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained, or if there be continuation of damage, then within six months next after the doing or committing such damage ceases, and not afterwards."

This clause does not appear in the English Railway Clauses Act, and we are not aware of any decision thereon bearing upon the case before us.

In the absence of authority, we consider that the legislature did not by the words used mean to include a case like the present. The injury here charged is at common law, by one proprietor of a close against the adjoining proprietor, for negligently managing a fire supposed to be caused on the land of the latter without his neglect or default. It is quite independent of any user of the railway. It might,

as stated in this count, have arisen from clearing land, burning rubbish, or the accidental dropping of fire from a smoker's pipe on ground unusually dry and ready for ignition; in short, from any cause equally applicable to the exercise of ownership or occupation of any parcel of land unconnected with the existence or use of a railway.

We deem it unnecessary to enter upon any larger discussion of the application of this clause than is required for the decision of this particular case—a claim at common law between proprietors of adjoining closes.

We think the ruling correct.

As to the other point, it was not necessary on this second count to prove how the fire originated. It is only the negligent management of it that is charged, and on that point there was a good deal of evidence which had to be left to the jury, and we cannot clearly pronounce their view to be so incorrect as to disturb this not very large verdict. The defendants we think certainly cannot complain of the manner in which the case was left to the jury on the merits.

Some points were noticed in the argument which, not being raised at the trial or on the rule, are not discussed here.

Rule discharged.

THE QUEEN *v.* ANDREWS.

Pawnbrokers—C. S. C. ch. 61.

Held, that a conviction under the Pawnbrokers' Act, Consol. Stat. C. ch. 61, for neglecting to have a sign over the door, as directed by the 7th section, was not sustained by evidence of one transaction alone; for the penalty attaches only on persons "exercising the trade of a pawnbroker."

Robert A. Harrison obtained a rule *nisi* in last Trinity term, calling on the convicting alderman and the county crown attorney to show cause why the conviction of defendant Andrews should not be quashed, upon the ground that the defendant was not shown to be a pawnbroker or a person exercising the trade of a pawnbroker, within the meaning of ch. 61, Consol. Stat. C.

It appeared from the conviction, which was returned to this court in obedience to a writ of *certiorari*, that the

defendant was convicted under the 8th section of ch. 61 for neglecting to have a sign placed over his shop with the word "Pawnbroker" thereon, as required by the 7th section.

The evidence taken before the alderman was set out at length in the body of the conviction, and disclosed that one Murdoch went to defendant with a gold watch and chain, and borrowed \$30 from him for a month, giving the watch as a security, and taking a receipt from the defendant as follows: "Toronto, February 15th, 1865. Received from Mr. Murdoch for sale by auction at our rooms at the expiration of thirty days from date, on which we have advanced the sum of \$33, gold watch and chain 18546. (Signed) ANDREWS & SON —." Murdoch giving to Andrews & Son a receipt for the \$33, containing the same conditions respecting the watch.

At the end of the thirty days, Murdoch not being able to pay the money, the time was extended for thirty days, when he paid the amount borrowed and obtained his watch.

During this term *Mr. McBride* showed cause, and *Harrison* supported his rule.

MORRISON, J., delivered the judgment of the court.

We are of opinion that this rule must be made absolute. The conviction only discloses a single act of the defendant, having taken a watch and chain by way of pawn or pledge. The case of the *King v. Buckle* (4 East. 346) is somewhat like this. There the defendant was convicted of selling silver plate, under the statute 31 Geo. II. ch. 32, without first taking out a licence; the 10th section of that statute enacting that all persons using the trade of selling, etc., silver plate, shall take out a licence. The defendant was convicted on evidence which in substance showed that on one occasion he sold a silver tankard. On appeal the Quarter Sessions confirmed the conviction, subject to the opinion of the Court of Q. B., and without hearing counsel the court thought the case too clear for argument, and held that it was no trading but a single act of selling on a particular occasion; that the penalty was not meant

to attach on any persons but those who used the trade of vending plate.

The first clause of our statute enacts that every person exercising the trade of a pawnbroker shall take out a licence, etc.; and the 7th section enacts that every pawnbroker shall have a sign, with his name and the word "Pawnbroker," etc., thereon over the door outside of the shop used by him for carrying on such business; and the 8th section provides that in case any pawnbroker neglects to have such sign so placed, he shall forfeit \$40, etc.

No evidence was given to show (other than the one transaction with Murdoch) that the defendant exercised the trade or carried on the business of a pawnbroker, or that he used for carrying on such business the premises in Adelaide Street, over the door of which it was charged he had not the sign required by the 7th section, nor does it appear where the defendant received the watch or lent Murdoch the money.

The penalty mentioned in the 8th section, under which the defendant was convicted, was not, in our judgment, intended to attach on any persons but those mentioned in the 1st section—namely, those "exercising the trade of a pawnbroker;" or carrying on such business, as mentioned in the 7th section; and we are of opinion that a single act of receiving or taking a pawn or pledge is not an exercising the trade or carrying on the business of a pawnbroker. For these reasons we think this conviction cannot be sustained, and that it must be quashed.

Rule absolute.

THE LAW SOCIETY OF UPPER CANADA v. THE CORPORATION
OF THE CITY OF TORONTO.

*Taxes paid under mistake of fact—Right to recover back—C. S. U. C. ch. 55,
sec. 61.*

The plaintiffs had for several years appealed from the assessment of their property to the Court of Revision, who had decided against them, and from thence to the County Court judge, who had reduced it about one-third, on the ground that a large portion of their building was occupied by the courts. In 1864, the same assessment being repeated, they appealed to the Court of Revision, who said they would consult the city solicitor, and that the plaintiffs need not appear again. The plaintiffs' solicitor was told by the clerk of the Court of Revision that no judgment had been given, and found none in the book where their decisions were entered. The collector in October called upon the plaintiffs' secretary, who supposing all was right paid the sum assessed, the mistake having been discovered in the following year.

Held, that they might recover it back, for the Court of Revision not having determined the appeal, the roll as regarded the plaintiffs was not "finally passed" within section 61 of the Assessment Act, so as to bind them. *Hagarty, J.*, dissenting, on the ground that the return of the roll unaltered as regarded the plaintiffs' assessment was in effect a decision against them.

A person seeking to recover money paid under a mistake of fact is not now bound to show that he has been guilty of no laches; the only limitation is that he must not waive all inquiry.

THE declaration contained the common money counts and an account stated.

Pleas—Never indebted, and payment.

The case was tried at the assizes for York and Peel, in January 1866, before *Morrison, J.*

The action was brought to recover back from the city the sum of \$432, which had been paid to the collector for one of the wards of the city under the following circumstances:—

The assessor for St. John's ward left the usual assessment paper at Osgoode Hall for the plaintiffs, by which the plaintiffs were assessed for Osgoode Hall and the land attached thereto at the annual value of \$1920. A similar assessment had been made of the same property for some years preceding, against which an appeal had been made in each year on behalf of the plaintiffs to the Court of Revision, who had decided against the appeal, which was then carried before the judge of the County Court, who had reduced the assessment about one-third, on the ground that a large portion of the building was used and occupied by the three superior courts for the administration of public justice.

On becoming aware of the assessment of 1864 the plaintiffs'

solicitor appealed to the Court of Revision, and appeared before them to sustain his objection on the 25th of May 1864. He was told they would consult the city solicitor. He objected to any delay in deciding, but they gave no judgment then, and he was told he need not appear again. He watched the matter, and inquired two or three times of the clerk of the Court of Revision, who stated to him that no judgment had been given. He also examined the book in which entries were made of the decisions of the Court of Revision, but found no entry of the decision of this appeal, and there was none up to the time of the trial. The object of this watching was to carry the appeal before the judge of the county. After the time for appealing had passed, the solicitor told one of the members of the Court of Revision the situation of the case, and thought no more of the matter.

In October 1864 the collector called upon the secretary of the plaintiffs at Osgoode Hall, and presented to him the ordinary paper showing the amount of rate imposed on the plaintiffs. The secretary presumed the charge (\$432) was right and paid it. The clerk of the Court of Revision, to whom the appeal was made in May 1864, stated that no decision had ever been given, and said he had made out the collector's book from the assessment roll as it stood at first and as appealed against.

In the following year (1865) the assessment was again appealed against, but the Court of Revision on being informed of the decision of the judge of the County Court acquiesced in it, and reduced the assessment accordingly. The plaintiffs' solicitor then for the first time learned what the secretary had paid in 1864. He wrote on the subject on the 29th of June and on the 29th of July, but got no answer. On the 2nd of August 1865 he wrote to the mayor, saying an action would be brought, and referring for the facts of the case to his letter of the 29th of June. Still no answer. He wrote again on the 13th of October to the chamberlain, but could get no satisfaction; and so this action was brought in November following.

The defendants' counsel objected that the plaintiffs could not recover, as it appeared that the assessment roll had

been finally passed under section 61 of the Assessment Act; that the payment by the secretary was voluntary, and therefore the money could not be recovered back.

Leave was reserved to the defendants to move to enter a nonsuit, and the plaintiffs had a verdict for the sum claimed.

McBride obtained a rule, calling on the plaintiffs to show cause why a nonsuit should not be entered on the following grounds: 1. That the roll under which the money was paid was finally passed by the Court of Revision for the city for the year 1864, and no appeal was made therefrom to the judge of the County Court; and that moneys paid to the defendants by virtue of said roll cannot be recovered back, notwithstanding any defect or error in or with regard to such roll. 2. That the payment of the moneys was voluntary, and made with a full knowledge of the facts, or it was a payment, if made in ignorance of the facts, yet accompanied by such laches as disentitled the plaintiffs to recover the same back.

Anderson showed cause, referring to *Marriot v. Hampton*, 2 Sm. L. C. 256; *Bell v. Gardiner*, 4 M. & Gr. 11.

The Court differing in opinion delivered their judgments *seriatim*.

HAGARTY, J.—The Court of Revision did hear the plaintiffs' complaint against the assessment. They did not, it is said, expressly make any decision of the appeal. The statute says they shall determine the matter and confirm or amend the roll accordingly. The roll, as a matter of fact, was finally passed by them and certified by the clerk under section 61, the plaintiffs' assessment remaining unchanged. The doubt I feel is whether this final passing and certifying of the roll must not be held to have been, as it was in effect, a decision adverse to the plaintiffs' appeal. Then the section says the roll so passed shall bind all concerned, notwithstanding any default or error committed in or with regard to such roll, except in so far as the same may be further amended on appeal to the county judge. Section 59 provides

that all the duties of the Court of Revision shall be completed and the rolls finally revised by them before the 1st of June. Section 63 allows an appeal to the county judge, a notice being given within three days after the decision. Then, under section 64, the clerk produces the roll "passed by the Court of Revision."

It seems to me that when the Court of Revision, after hearing a complaint, finally pass the roll, leaving the assessment complained of unaltered, they decide against the complaint. When they decide on finally passing the roll, leaving the plaintiff's assessment unaltered, do they not decide against him? His being thrown off his guard and rendered less watchful in consequence of something said to him is another matter.

In the case before us all damage to the plaintiffs could be easily avoided. The complaint was heard on the 25th of May. Complainants knew that by law the roll must be finally revised by the 1st of June, a few days after the hearing. They could have appealed to the county judge within three days from passing the roll. There is also a power given by section 62 to the Court of Revision, before or after the 1st of June, and with or without any notice, to receive and decide on any petition from any person who, by reason of gross and manifest error in the roll as finally passed, has been overcharged more than twenty-five per cent.

Whatever may be the practice of these courts of revision as to making lists of particular complaints and entering a special adjudication in each, the statute does not seem to require it. The direction is merely that after hearing the complainant the court shall determine the matter, and *confirm* or *amend* the roll accordingly. They need not decide it in complainant's presence. If they accept his complaint of overcharge, they must of course alter and amend the roll; if their view be adverse to him, they leave the roll unaltered, and finally pass it in that state. I feel great difficulty in saying that the latter course is not a determining of his complaint. It may be very inconvenient, but is it unlawful?

If the appeal to the county judge should take place whilst the roll is still before the Court of Revision as each

case is decided, then I at once concede that there must be an independent adjudication on each case. But it is not so.

A number of persons come before the court complaining of overcharge, and asking to have the amount stated in the roll reduced. Out of, say, fifty appeals the court accede to the cases made by twenty applicants, and then, under the statute, the amount in the roll is altered accordingly. As to the remaining thirty persons they are heard, and nothing is then decided. The court may remark to some parties that they will further consider it, to others that they will consult their solicitor. They may do so or may not, as they please. The same day, next day, or at some subsequent day, they direct the clerk to certify the roll as finally passed, and he so certifies it, leaving the thirty appellants' assessment unaltered. This seems to me a statutable rejection of the appeals.

Nor do I see how the fact of the clerk swearing that in fact no particular further consideration was given to any one or more of the appeals after the day of hearing can affect the act. The whole point seems to me to be, has the roll been altered, or has it been confirmed in its original state? I have no right to prescribe any particular form of confirmation, when the very act of passing and certifying the roll to all intents and purposes necessarily leaves the first amount unaltered and confirmed; in other words, unless the court, after hearing the appellants, alter the roll before finally passing it the appeal fails, and the first assessment stands. The alteration is the active result of the appeal; the non-alteration or passing the roll without alteration is the opposite result, equally indicative of the judgment or decision of the appeal.

The plaintiffs then are aware, or we must assume them to be aware, that the roll must be finally passed by a specified day. When passed, their assessment, reduced or left unreduced, must be in it. They must know that all appeals therefrom are heard by the county judge, who must do all his part by the 15th of July. It was just as easy for them to inquire from the clerk if the roll were finally passed and certified as to ask if their claim was disposed of. After all

appeals to the county judge are heard and known to be finally disposed of, and the general assessment of the city, necessarily including this case, reduced or confirmed, and when I think the plaintiffs should be held bound to understand their position, in the month of October they are shown by the collector the usual schedule of their taxes, headed "as settled finally by Court of Revision," and then pay the amount. I have been unable to bring myself to the conclusion that money so paid can be recovered back.

DRAPER, C.J.—The only question requiring consideration is whether by the Assessment Law the plaintiffs are concluded from denying the finality of the assessment roll as to their liability to the amount and value of their property, liable to taxation for the year 1864.

The right to recover back the money paid is, I think, clear if this difficulty be surmounted. In *Townsend v. Crowdy* (8 C. B. N. S. 493), *Williams, J.*, observes that at one time the rule that money paid under a mistake of facts might be recovered back was subject to the limitation that it must be shown that the party seeking to recover it back has been guilty of no laches. But that since the case of *Kelly v. Solari* (9 M. & W. 54) it has been established that it is not enough that the party had the means of learning the truth if he had chosen to make inquiry. The only limitation now is, that he must not waive all inquiry. Nearly all the cases on the subject are collected in *Holland v. Russell* (4 B. & S. 14).

Then as to the Consol. Stat. U. C. ch. 55. After creating the Court of Revision, to try all complaints in regard to persons being wrongfully placed upon or omitted from the roll, or being assessed at too high or too low a sum, it provides (sec. 60, sub-sec. 1) that any person complaining (among other things) as having been overcharged, may give notice to the clerk of the municipality, who is to post up a list of complaints, with an announcement when the court will be held to hear them (sub-sec. 3), and shall give certain prescribed notices. The court, after hearing upon oath the complainant and the assessor, and any witness adduced,

“shall determine the matter, and confirm or amend the roll accordingly” (sub-sec. 12); and (sec. 61) “the roll as finally passed and certified by the clerk as so passed, shall be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, except in so far as the same may be further amended on appeal to the judge of the County Court, which appeal is given by section 63; and certain prescribed notices having been given, “the judge shall hear the appeals, and may adjourn the hearing from time to time, and defer the judgment thereon at his pleasure, so that a return can be made to the clerk of the municipality before the 15th of July,” and his decision is conclusive; and when after this appeal the roll has been finally revised and corrected, the clerk of the municipality shall without delay transmit to the county clerk a copy thereof.

The appeal to the county judge cannot take place until the Court of Revision has decided upon the appeal to them, and their determination on each appeal to them is a part of the duty imposed upon them by sub-sec. 72 of sec. 60, and the performance of that duty must necessarily precede any confirming or altering the roll. It would be a singular construction of the powers and duties of the Court of Revision, upon any appeal made to them by a ratepayer, which would enable them to withhold giving a decision and yet to confirm the roll as prepared by the assessor as if no appeal had been made. Nevertheless, that appears to be the result of the contention of the defendants.

I think it is more consistent with the expressed intention of the Act to hold that an appeal made to the Court of Revision must be determined in some way; that to abstain from determining is no determination; and that such withholding or abstaining from a determination, and then finally passing the roll as if no appeal had been made, is not a “defect or error committed in or with regard to such roll.”

Even if the want of a determination had arisen from accident or oversight, I should incline to this conclusion; but where the facts tend to establish that it was not overlooked, and no explanation of any kind is even suggested,

I feel compelled to decide that no ratepayer can be thus deprived of his appeal and at the same time be bound by the assessment complained against. It may happen, as was pointed out on the argument, that a ratepayer under such circumstances would escape paying anything for that year; but conceding, without adjudging, that such a consequence must follow, it is the omission of the Court of Revision which causes it, in neither confirming nor correcting the roll *quoad* his appeal. As to his assessment they have done nothing, and as to him, therefore, they have not finally passed the roll so as to bind him, though the other portions of the roll may be held to be final and conclusive.

I think this rule should be discharged.

My brother *Hagarty's* judgment has not changed my opinion. The Court of Revision, according to the evidence, had an established course of procedure in disposing of appeals from the assessor's entries on the roll, for they had a book kept in which all their decisions on such appeals were entered, and it is sworn there is no entry of any such decision on this appeal. And, further, their own clerk has sworn that no such decision was ever pronounced. When it appears that a similar assessment had been made for some years preceding, and that the Court of Revision had invariably upheld the assessment and decided against the appellants, on which the judge of the county had been appealed to, and had uniformly, on a clear intelligible principle, decided that the assessment was wrong, and had reduced it accordingly, I think that I am warranted in holding that the evidence of the clerk and of the non-entry of a decision is decisive that this appeal of the plaintiffs never was determined. I did not understand their counsel on the argument to suggest even that he should succeed on this ground, though he argued strenuously that the circumstances under which the money was paid deprived the plaintiffs of any right to recover it back. I think in this case the whole weight of evidence establishes the negative proposition—namely, that the Court of Revision did not determine this appeal at all; or, put affirmatively, that, whether designedly or no, they withheld a decision. I cannot, in the face of the

facts as I understand them, hold that by the pure force of the words of the statute the Court of Revision, by doing absolutely nothing, have confirmed the assessor's roll.

MORRISON, J.—I entirely agree with the judgment of the learned Chief Justice. I have merely to add that, in my opinion, when a person assessed appeals against the assessment a duty is imposed upon the Court of Revision to try the complaint, and the appellant is entitled to the opinion and decision of the court on the matter appealed against before he can be made liable to any taxes arising from the assessment, and until it is determined one way or the other the assessment against the appellant is in effect withdrawn from the roll. I cannot assent to the view urged by the defendants, that if a matter appealed has not been decided by the court in fact, it is nevertheless by implication of law decided and determined by the clerk certifying the roll as passed; in other words, that the Court of Revision has given its decision, although in truth the court after hearing the appeal refused or neglected to determine it. The whole tenor of the provisions relating to the Court of Revision and its proceedings is, in my opinion, against such a construction; and if such was the intention of the legislature, I cannot help thinking that apt words would have been used to indicate it.

Although this court will not direct in what manner the Court of Revision should promulgate its determination, it manifestly appears by the 63rd section that the legislature intended it should be done in some way analogous to the course adopted by other courts, so that the appellant (in the words of the statute) if dissatisfied with the decision may appeal therefrom, and give the three days' notice thereafter to entitle him to the appeal to the county judge. If the defendants' contention be right as to a decision by implication, the 63rd section should have further provided for the notice in that case being given within three days after the roll being finally passed. It may be said that it is a hard case if a ratepayer can escape taxation by the neglect of the Court of Revision; but it would be a still greater hard-

ship if a person wrongfully assessed is made liable to pay taxes through the neglect, wilful or otherwise, of the court.

If the law is defective, it is for the legislature to provide the remedy. Were we to hold that what the defendants contend for is right, it would, in my judgment, open the door to a system of procedure in those courts liable to abuse and productive of injustice to appellants, and which in effect would shift the labour and responsibility to the county judge, compelling parties aggrieved to give two sets of notices of appeal and to incur costs—matters never contemplated by the legislature, except in appeals against actual decisions of the Court of Revision.

As the statute in some respects admits of different constructions, and the matter is one which annually affects all persons of property, it is to be hoped that measures will be taken to render the intention of the legislature plain to the members of the Court of Revision, a body who are continually changing, and who cannot be expected to be conversant with the expounding of statutes where the intention is not clearly expressed.

Rule discharged—*Hagarty, J.*, dissenting.

THOMAS M'LEOD CLARK v. THE WESTERN ASSURANCE CO.

Insurance—Plaintiff's interest—Admission of by pleading—Warehouse receipts—Fraud—Identity of wheat insured with that lost.

Plaintiff sued upon a policy of insurance on wheat in a certain warehouse, alleging that at the time of effecting the policy, and thence until and at the time of the loss, he was interested in the property to the amount insured. Defendant pleaded that he was not at the time of the loss interested as alleged.

Held, that on these pleadings it was not admitted that the plaintiff, at the date of the policy, had in the warehouse the quantity mentioned in the receipt, and that in the absence of any proof of the extent of his interest he would be entitled only to nominal damages.

Plaintiff obtained a warehouse receipt from one F. for 2000 bushels of wheat as in store for him, subject to his order, and effected an insurance on it with defendant, as upon so much wheat in F.'s warehouse. *Held*, that in order to recover upon the policy it was not necessary to prove that the identical wheat insured was destroyed; but that the quantity claimed for must have been in the warehouse under F.'s control *during the whole period* between the insurance and the fire.

The warehouseman gave three receipts—1, On the 24th of January, as from himself as owner (as permitted by 24 Vict. ch. 23) for 1700 bushels; 2, on the 26th to the plaintiff for 2000 bushels; and, 3, on the 15th of February to one P. for 3000 bushels. The first receipt was transferred by F. to a bank as security for \$1000. When P. bought from F. the last-mentioned quantity, the \$1000 was paid out of the purchase-money, and thus the 1700 bushels was released. F. had given these receipts fraudulently for more wheat than he really had; but the jury found that there were 2000 bushels in the warehouse at the time of the fire. *Held*, that the receipt for 1700 bushels could not stand in the plaintiff's way, the claim on it having been extinguished; and that F.'s fraud on other parties could not be set up by defendants in answer to plaintiff's claim on the policy.

THIS was an action on a policy of insurance against fire, made by the defendants in the plaintiff's favour, dated 29th January 1865, in the sum of \$1500, on 2000 bushels of wheat stored in John Fishleigh's frame warehouse, in the village of Mitchell, for two months. The policy also covered in a similar sum 2000 bushels of wheat stored in James Hill's frame warehouse in the village of Mitchell. The declaration averred that the plaintiff "at the time of making the said policy, and thence until and at the time of the damage and loss hereinafter mentioned, was interested in the said property so insured to the amount so insured thereon," and there were averments that the property insured was burnt; and the plaintiff claimed \$4000.

Apparently but little of the wheat was absolutely destroyed by the fire, though there must inevitably have been some considerable waste.

Pleas.—1. *Non est factum*. 2. That the said 4000 bushels of wheat were not burnt or destroyed by fire as

alleged. 3. That the plaintiff was not at the time of the alleged damage and loss interested in the said wheat as alleged.

The case was tried at Toronto, in November 1865, before *Adam Wilson, J.*

It appeared that Fishleigh had a frame warehouse for storing wheat. Three warehouse receipts were put in, each signed by him. The first was dated on the 24th January 1865 as follows: "Received in store from myself, owner, seventeen hundred bushels of wheat, to be delivered pursuant to his order to be indorsed hereon. This is to be regarded as a receipt under the provisions of statute 22 Vict. cap. 20, being 22 Vict. cap. 54 of the Consolidated Statutes of Canada, and the amending statute 24 Vict. cap. 23." It was indorsed in blank by Fishleigh.

The second bore date 26th January 1865, and was: "Received in store from T. M. Clark 2000 bushels of spring wheat, to be delivered to the order of T. M. Clark, to be indorsed hereon," and concluded as the former one, referring to the statutes. This was indorsed, "Toronto, 30th January 1865, Deliver to order Bank of Montreal." Signed for T. M. Clark by an agent.

The third receipt was dated 15th February 1865, and was for 3000 "bushels sp. wheat," in favour of Parkyn and Atkinson, and was in form similar to the other two. It was indorsed, "Deliver within to the order of the Bank of Montreal, Stratford, Feb'y 16, 1865. Parkyn and Atkinson."

As to the first of these receipts, it was proved to have been transferred by Fishleigh to the Bank of Montreal on the day it bore date, by being delivered to their agent at Stratford, who advanced to Fishleigh \$1000 for fifteen days. It fell due, including three days grace, on the 11th of February 1865, when it was paid, as hereafter mentioned. The bank agent treated the transaction as a pledge of the 1700 bushels of wheat to secure the advance of \$1000, and when that money was paid the wheat was considered as redeemed and the bank as satisfied.

The plaintiff's claim was rested on the second of these receipts. There was conflicting evidence as to the quantity of

wheat in Fishleigh's warehouse at the date of this receipt. Two witnesses who had been in Fishleigh's employment stated their belief that there was as much as 2000 bushels. Davies, a witness for the defence, who had also been in Fishleigh's employment, and had the best opportunities of forming a judgment, said that he did not think there were more than two carloads at that date, and that on the 28th of January the quantity did not exceed 500 bushels. According to one of the plaintiff's witnesses, there were 4000 bushels at or shortly before the time of the fire; according to two others, 3000 bushels; according to a fourth, only 2500. On the defence, one Hersey estimated the quantity shortly before the fire at 3000 bushels; and Davies thought there were about two carloads on the upper floor and the same quantity on the lower, a carload being estimated at from 350 to 360 bushels, making at the utmost 1440 bushels. The quantity which was gathered up after the fire was sold as amounting to 1246 bushels.

It further appeared that before giving the first receipt Fishleigh had effected an insurance of \$1500 on 2000 bushels of spring wheat contained in his storehouse for four months from the 24th of December 1864 with the Liverpool and London Company, which by assignment dated the 1st of February 1865 he transferred to the Bank of Montreal as a collateral security for the advance of \$1000. This policy also covered \$500 on stock contained in the same building. Fishleigh also effected another insurance of \$1500 on 2000 bushels of spring wheat contained in his storehouse for four months from the 19th of January 1865 with the Liverpool and London and Globe Insurance Co., which, by assignment dated the 15th of February 1865, he transferred to the Bank of Montreal.

As to the third receipt, it was shown that one Hersey bought of Fishleigh 3000 bushels of spring wheat on or just before the 15th of February 1865, and desired to raise a sum of \$2000 upon it. Upon some arrangement, explained by Hersey as arising from the fact that he bought this wheat for Parkyn of Montreal, this receipt was taken in the name of Parkyn and Atkinson. Hersey applied to the agent of

the Bank of Montreal at Stratford, who said Parkyn and Atkinson must draw on Parkyn of Montreal, with this warehouse receipt attached. Fishleigh had told Hersey that he must release the 1700 bushels of wheat mentioned in the first receipt before he would be in a situation to transfer the 3000 bushels; and the bank agent had pressed Fishleigh to sell the 1700 bushels and pay the advance of \$1000. It was arranged by Parkyn and Atkinson drawing for \$2000 as proposed. The bank agent discounted the draft and placed the proceeds to Fishleigh's credit, who was charged with the \$1000, and thus the 1700 bushels were discharged from any lien which the bank had over them. Hersey was not aware of the sale to the plaintiff.

Fishleigh afterwards became insolvent, and an assignee to his estate was appointed. In April or May 1865 he went to Chicago, and had not returned.

A book was produced at the trial, kept as the storehouse or warehouse book by Fishleigh, and the evidence showed that it had been falsified; that three leaves had been cut out of it, and that in their place were other leaves containing entries, all in Fishleigh's writing. Davies, who had been in Fishleigh's employment, swore that he made a number of entries in this book in the months of January and February, but they were not in the book when produced at the trial, and the entries as they appeared after the date of the 6th of January were in Fishleigh's writing. According to the book there were in the warehouse on the 24th of January 4631 bushels, and 4635 bushels at the time of the fire.

The plaintiff had received 350 bushels, and claimed for 1650 to make up the 2000 for which he held a receipt. The book would show very nearly enough to satisfy this quantity and the receipt to Parkyn and Atkinson for 3000.

The learned judge, after going minutely through the evidence, told the jury that if there was no wheat in the warehouse at the time of the fire, or a less quantity than the plaintiff claimed, the plaintiff could not recover in the first case, and only for the less quantity in the second. He directed them to find whether any of the plaintiff's property, according to the second issue, was destroyed by fire.

He ruled that so soon as the bank lien or mortgage over the 1700 bushels was at an end, the plaintiff's claim under his receipt would attach upon this quantity, as the transaction of the 15th of February was not a release or transfer by the bank to Parkyn and Atkinson, but a new and distinct sale by Fishleigh to these parties. It was objected that the plaintiff could not recover on the policy unless the wheat destroyed be the identical wheat, grain by grain, which he purchased from Fishleigh. The learned judge held that the general language stating the thing insured, not professing to give any more special description than that it was spring wheat, not referring to it as in any particular bin, or place, or bags, to fix its identity, would apply to any spring wheat in that storehouse which Fishleigh had, provided that no other person had there some special and particular quantity identified as appropriated to that person's use.

And he stated that the plaintiff was not answerable for Fishleigh's misconduct, except so far as it might affect his title on the 26th of January 1865, or the continuance of the wheat in the warehouse until the fire.

The jury found for the plaintiff for the value of 1650 bushels, and they found that there were 2000 bushels in the warehouse at the time of the fire.

Robert A. Harrison obtained a rule calling on the plaintiff to show cause why there should not be a new trial, on the ground of misdirection, in telling the jury, 1st, that it was admitted by the record that the plaintiff owned 2000 bushels of wheat in Fishleigh's warehouse at the time of the insurance. 2nd, That the defendants were bound to pay the plaintiff for any 2000 bushels of wheat which he could at any time demand from Fishleigh between the time named in the policy and the fire, whether *in esse* and in the warehouse at the time of the insurance or not. 3rd, That the plaintiff's receipt for 2000 bushels was entitled to priority over the receipt for 3000 and the 1700 bushels therein contained, being part thereof; or for a new trial, on the law and evidence and weight of evidence, and the judge's charge, and excessive damages, and that the defendants are only

liable, if at all, for a *pro rata* insurance, *i.e.* such portion of the loss sustained as the same should bear to the whole amount insured; as Fishleigh, the bank, the plaintiff, and Parkyn had an undivided insured interest in the wheat, which had not been allotted or separated at any time, or at the time of the fire, among them. He cited *Robertson v. French*, 4 East, 130; *Waters v. The Monarch Assurance Co.*, 5 E. & B. 870; *Proudfoot v. Anderson*, 7 U. C. R. 573.

M. C. Cameron, Q.C., showed cause, and cited *Milligan v. Equitable Insurance Co.*, 16 U. C. R. 314.

DRAPER, C.J., delivered the judgment of the court.

The evidence in this case appears to us to establish very clearly either that Fishleigh gave receipts for more wheat than he had in his warehouse at the respective dates, or, if he had at the date of the last receipt as much wheat as that receipt stated in addition to the quantity mentioned in former receipts, that in disregard of the rights of the holders of those receipts he transferred the wheat, or a considerable part of it, to other persons; and the evidence given with respect to the warehouse book leads to the conclusion that the entries were falsified in order to mislead.

We may, we think, properly notice, as was suggested by *Sir John Robinson, C.J.*, in *Tilt v. Silverthorne* (11 U. C. R. 620), what has been often proved before us in relation to the business of a warehouse-keeper in this province—that he receives grain, among other commodities, to be kept at the disposal of the party delivering it, in large or small quantities according to circumstances, giving to each person who delivers such grain a receipt or acknowledgment of the grain delivered; that unless under exceptional circumstances, or a special agreement, all the several loads of spring wheat are mixed together, and so with other cereal grains, so that the spring wheat or other grain mentioned in any one receipt cannot, when stored, be distinguished from similar grain mentioned in other receipts, such receipts being considered as an undertaking by the warehouse-keeper to deliver to the holder the quantity of specified grain for which the receipt is given.

And neither the Consolidated Statute of Canada, nor the Act 24 Vict. ch. 23, make any change in this understood course of dealing, though the latter Act, which enables the warehouseman to give receipts in that capacity for grain, etc., of which he is also the owner, has introduced a new element into these transactions; it may be added, an extremely dangerous element.

If Fishleigh's conduct has been fraudulent, or even a misdemeanour under the Act, there is nothing in the plaintiff's dealing with him to invalidate such rights as would vest in him under the receipt of the 26th of January 1865. It is not questioned that he was a *bonâ fide* purchaser. He takes a receipt coming within the 24 Vict. ch. 23, *i.e.* from the party who is owner and warehouseman; and as to this part of the case the only question was, whether Fishleigh had 2000 bushels to sell, and whether, as a consequence, the plaintiff had acquired an insurable interest in that quantity. There was evidence to go to the jury as to Fishleigh, *pro* and *con*, and it was left to them. As to the plaintiff, the learned judge told the jury that on the pleadings it was not denied that he was interested in the quantity mentioned in the receipt at the time he effected the insurance, and as a consequence his interest was virtually admitted.

It is not without much hesitation that we have adopted the conclusion that this direction, looking at the whole record, is wrong. In *Waters v. The Monarch Fire Assurance Co.* (5 E. & B. 870) the plea denied the plaintiff's interest before as well as at the time of the fire. In the *London and N. W. Railway Co. v. Glyn* (5 Jur. N. S. 1004) the question was raised on a plea denying that the plaintiff had an insurable interest. Here there is a plea, that at the time of the alleged damage the plaintiff was not interested, which leaves his interest at the time of the insurance untouched. Before the new rules *non assumpsit* when pleaded to a policy not under seal put everything in issue, but one of the illustrations of the limited operations of that plea is an action on a policy of assurance, in which, as is declared, that plea will not operate as a denial of the interest. But the case of *King v. Walker* (2 H. & C. 384) suggest a test as

to the extent to which an admission of an averment by not traversing it goes ; and that test is, assume that the averment was precisely traversed, what would the plaintiff have to prove to entitle him to succeed on the issue ? It appears to us that if he proved he had in the warehouse at the time of the insurance a less quantity than 2000 bushels, he would be entitled to recover according to that less quantity ; and if so, then it must follow that if, in the absence of any such traverse, the plaintiff gave no evidence of the extent of his interest, he would only be entitled to nominal damages. But the direction did not give that limited effect to the admission, and therefore, though there was evidence upon which very possibly, even probably, the verdict is founded, we cannot say it was not occasioned or greatly influenced by the charge upon this point ; and there must therefore be a new trial without costs.

The case involves several other questions, which have been argued at large before us, and to which we have devoted much time and consideration. It may facilitate the final disposal of this case if we state some of the conclusions we are inclined to adopt.

It has been insisted that the plaintiff was bound to prove that the identical wheat he purchased and insured was destroyed by the fire. We do not accede to this proposition, thinking that the defendants must be taken to have contracted upon the usual and well-understood course of business in the receiving, storing, and delivering wheat into and from warehouses, and therefore they knew the plaintiff's right was to get 2000 bushels of spring wheat from that warehouse, as he had purchased that quantity being stored there ; and they made the policy accordingly. The statute appears to us to have made the warehouse receipt evidence of the right, as it has made the right transferable for some purposes by indorsement and delivery of the receipt ; the wheat is then virtually assumed to be where the receipt represents. The evidence in this case illustrates this received course of dealing. It does not appear that either of the parties who took receipts from Fishleigh took any steps to ascertain that he had the wheat in store which his receipts assert.

If they had been receipts given, as was formerly the exclusive practice, to persons who actually brought the wheat to the warehouse, it might be fairly concluded that the quantity was carefully ascertained before the warehouseman gave an undertaking to redeliver it; but when the warehouse receipt is given by him for wheat which he professes to own, and which he professes to pledge or sell, receiving a consideration according to the quantity named in the receipt, it makes a very obvious difference. But this does not affect the question of the necessity of identifying the wheat insured with that afterwards destroyed. According to the evidence large quantities of the wheat were brought into the warehouse after the plaintiff's purchase and the insurance, and large quantities were taken away between the date of the policy and the fire. As to this, we are of opinion that provided there was, *during the whole period*, as much wheat in the warehouse under Fishleigh's control as the plaintiff was entitled to receive, the policy would attach upon that quantity, not exceeding 2000 bushels, to which the plaintiff was entitled, although he could not prove that the same identical grains of wheat which were in the warehouse at the date of the policy were those which were destroyed. The learned judge, while repelling this objection, held that if after the date of the policy the quantity of wheat remaining in the warehouse was at any time reduced below the quantity to which the plaintiff was entitled, the liability of the defendants would be proportionally diminished, and would not be restored although other wheat was subsequently brought in sufficient to satisfy the existing claim of the plaintiff on his receipt. In this we also agree.

As to the 1700 bushels of wheat mentioned in the first receipt, we think the evidence of the bank agent prevents any doubt. That quantity, no more severed than the 2000 bushels sold to the plaintiff were severed, being in store, was pledged to secure repayment of an advance of \$1000 made to Fishleigh. Conceding that the plaintiff's purchase was in fact subject to this pledge, the money was repaid, and the mortgage was satisfied. There was no transfer or indorsement of the receipt for 1700 bushels. The claim of the

lenders was simply extinguished, and no right deducible from it as a continuing claim or title could any longer exist.

It was further objected that the plaintiff had no right to claim the quantity of wheat mentioned in his receipt, because Fishleigh subsequently to the giving of that receipt had given another to Parkyn and Atkinson for 3000 bushels of wheat when there was not wheat enough in the warehouse to satisfy both. We do not see on what ground Fishleigh's assumed fraud on other parties can be set up by the defendants in answer to the plaintiff's claim on the policy. If there had been no wheat in the warehouse at the time of the fire, the plaintiff could not have recovered; if there had been less wheat than the plaintiff was entitled to, the plaintiff's claim on the policy would have been so much less; but if there were 2000 bushels in the warehouse when the fire happened which were damaged or destroyed, and the plaintiff had at that time (having taken away 350) a right to demand 1650 bushels, then the fire has damaged the plaintiff to that extent, to secure himself against which loss he obtained the policy.

The facts elicited in this case show what complications may arise from the system of warehousing and the dealings connected therewith, especially where the warehouseman, being owner, gives receipts either for wheat which he has not got, or disposes of wheat for which he has already given receipts to purchasers, in fraud of them or of those to whom he professes to make a subsequent disposition of the same grain. The liability to prosecution for a misdemeanour will hardly prevent such a fraud; at least it is to be feared it has not done so in this case.

For the reasons already given, we think there must be a new trial without costs.

Rule absolute.

ADAMS v. M'CALL.

Insolvent Act, 1864, sec. 8, sub-sec. 4—Unjust preference—Anticipated delivery.

S. on the 25th of November 1864 agreed to deliver certain timber to the plaintiff at T., in the State of New York, in May, June, July, and August 1865, \$1500 payable down, the same sum on the 15th January, 1st March, and 1st April 1865, and the balance on delivery at T. On the 14th of December following he assigned the timber to L. as security for certain advances in goods which L. agreed to make to enable him to get it out, and on the 27th of February 1865 formally delivered it to L.'s son, who after consulting with S. wrote to the plaintiff that S. desired to deliver the timber to the plaintiff, but was in difficulty; that some of his creditors refused to wait until he could complete his contract, and had commenced actions, and recommending that the plaintiff should anticipate their action by taking a delivery before they could interfere. On the 11th of March the plaintiff accordingly paid L.'s claim and took a delivery. On the 3rd of March L. had served a writ on S., telling him it was to secure precedence; and an execution was obtained in this suit, under which the sheriff seized. On the 14th of April S. made an assignment under the Insolvent Act of 1864 to the defendant. He admitted that he was insolvent on the 11th of March, and long previous, though he said he did not then know it, and had not informed the plaintiff of it.

Semble, that these facts showed the delivery to the plaintiff to be a transfer by S. "in contemplation of insolvency," the effect of which was to give him "an unjust preference over the other creditors," and that it was therefore void under sec. 8, sub-sec. 4 of the Insolvent Act, 1864; and the jury having found for the plaintiff, a new trial was granted, with costs to abide the event.

INTERPLEADER, to try whether the plaintiff was owner of 148,000 feet, cubic measure, of square pine timber, or any part thereof, put into Big Creek, in the township of Walsingham, during the winter of 1864-65, by Daniel Shoemaker, as against the defendant as assignee of Shoemaker, by assignment under the Insolvent Act of 1864, dated 14th April 1865, made by Shoemaker to the defendant.

The issue was tried at Simcoe in October before *John Wilson, J.*

It was proved that D. Campbell, Esq., the owner of lots numbers 13, 14, and 15 in the third concession south of the Talbot Road, in the township of Middleton, sold all the growing timber thereon over twenty inches across the stump to Lombard and M'Dougall, with licence to enter and cut, etc. This was by deed dated 25th July 1863.

By deed dated 13th August 1864, Lombard and M'Dougall assigned this timber and their right to cut, etc., to Daniel H. Shoemaker, who on the 14th of December 1864 assigned the same to William Lyons.

On the 25th of November 1864 Daniel H. Shoemaker,

by deed, agreed to deliver to the plaintiff, in the harbour of Tonnewanda, Erie county, State of New York, during the months of May, June, July, and August 1865, 150,000 cubic feet of white pine timber. In this agreement reference was expressly made to the timber at that time made from the Campbell lot, about 60,000 feet—the plaintiff to pay at the rate of \$100 per thousand cubic feet, \$1500 down, a like sum on the 15th of January, 1st March, and 1st April 1865, and the balance on delivery and inspection at Tonnewanda.

On the 14th of December 1864 Daniel H. Shoemaker executed a chattel mortgage to William Lyons to secure performance of an agreement of the same date for the making, drawing, and rafting all the pine timber above twenty inches in diameter on the above-mentioned lots, and delivering the same to the said Lyons at anchor in Port Rowan; the said Lyons having agreed to furnish Shoemaker with goods and merchandise suitable and necessary for men engaged in getting out timber to the amount of \$6000, conditioned to repay Lyons the amount due for the goods so to be furnished to him. The chattels mortgaged were set out in a schedule annexed to the mortgage.

On the same 14th of December Shoemaker executed the assignment to Lyons of the standing timber above noted.

On the 11th March 1865 William Lyons, by deed of that date, in consideration of \$6500, assigned and transferred to the plaintiff the assignment made by Shoemaker to him, and all benefit thereof, and all the pine timber which had been made upon the three lots, 13, 14, and 15 above mentioned, which timber was then mentioned as lying in Big Creek, in the township of Walsingham; and all his (Lyons') interest in an agreement with Shoemaker for the manufacture and delivery of the said timber. At the foot of this instrument Shoemaker executed a deed assenting to the assignment by Lyons to the plaintiff, and releasing Lyons from all claims under the deed between himself (Shoemaker) and Lyons.

On the same 11th of March Shoemaker, by deed of that date, in consideration of \$4500, sold, assigned, and trans-

ferred to the plaintiff all his interest at law and in equity in 140,000 cubic feet of square timber then lying in Big Creek, township of Walsingham, being timber manufactured by him upon the three lots above mentioned for the plaintiff, in pursuance of the agreement of the 25th of November 1864.

On the 27th of February 1865 Shoemaker delivered this timber over to Lyons, and he ceased doing more with regard to it. Lyons sent his son to Big Creek, and he received possession of the timber, and put one Andrew M'Donald, who had been Shoemaker's foreman, in charge of it; and he also wrote a letter to the plaintiff, informing him of what had been done, and stating that some of Shoemaker's creditors had refused to wait until he could fulfil his contract with the plaintiff and had commenced actions; and suggesting, as he stated, after consulting with Shoemaker, that the plaintiff should anticipate the action of the creditors by closing up the transaction and taking a delivery of the timber before they could interfere, and saying that it was necessary to act promptly.

The plaintiff on the 9th of March sent an agent, who settled Lyons' claim, and on the 11th of March took a delivery of the timber at Big Creek instead of Tonnewanda Creek in July or August. The plaintiff paid Lyons \$6500, and Lyons entered into an agreement to run the timber to Port Rowan Bay, to be thence taken to Tonnewanda. Lyons caused Shoemaker to be served with a writ on the 3rd of March, informing him, through his (L's) son, that the object was to obtain precedence and secure his debt; and a writ of execution was obtained and put into the sheriff's hands, who seized the timber as Shoemaker's, but allowed Lyons to run it down the creek. This seizure had not been abandoned on the 1st of July. The plaintiff was not, so far as appeared, aware of this suit.

It appeared that Lyons got out 64,000 feet of the timber on the three lots in 1863-64.

Shoemaker stated that he requested Lyons' son to write to the plaintiff and tell him of his (Shoemaker's) difficulties; that he was so pressed by his creditors that he should not be able to deliver the timber at Tonnewanda Creek; but he

never informed the plaintiff that he was insolvent. He said he wished to fulfil his contract with the plaintiff as far as he could; that the plaintiff paid him about \$4500, and got the timber for what he paid Shoemaker and Lyons. He also said that it was two years and a half since he was solvent; that he supposed he was solvent, but he was not; that there was nothing but this timber for the assignees.

On the defence it was objected that Shoemaker, being insolvent, could make no legal title to the plaintiff; that there was no visible change of possession in regard to Lyons on the 27th of February, nor any visible change in regard to the plaintiff on the 11th of March; that if the plaintiff claimed through Lyons the whole dealing of the parties showed that the title was not considered to be in them, and there never was any delivery to him.

The jury were directed to determine whether the transactions between Shoemaker, Lyons, and the plaintiff took place in good faith; whether there was an actual and continued change of possession on the 27th or 28th of February and on the 11th of March; and whether the plaintiff had knowledge of Shoemaker's insolvency, and if so, when.

It was objected to the charge that in presenting the case to the jury under the clause of the Act for the relief of insolvent debtors in regard to intention, the jury were told it was proper to inquire whether Shoemaker, in dealing with Adams (the plaintiff), was honestly desirous of carrying out his contract with him, or was intending to give him a preference; that if what Shoemaker did had the effect of giving a preference, it was immaterial what he intended; that if the plaintiff was a creditor up to that time, anticipating the delivery of the timber was giving him a preference; that what would be a sufficient delivery as between the parties would not be enough under the statutes as between them and the creditors. The learned judge recalled the jury, and made further observations to them on these points; and no objection was then renewed.

The jury found, 1st, that the transactions were *bonâ fide*; 2nd, that there was a delivery of the timber on the 27th or 28th of February, followed by an actual and continued

change of possession ; 3rd, that Adams knew on the 11th of March of the insolvency of Shoemaker at the time Lyons delivered the timber to him ; and they found for the plaintiff.

In Michaelmas term *Anderson* obtained a rule, calling upon the plaintiff to show cause why a new trial should not be granted for misdirection, in telling the jury that if the delivery of the timber was in pursuance of a former bargain, though the property was not vested in the plaintiff by such bargain, the anticipation of delivery would not amount to a preference, though made by Shoemaker when in a state of insolvency, and for the express purpose of giving such timber to the plaintiff and preventing its being seized by his creditors ; and in telling the jury that a delivery which would be sufficient to pass the property between the parties would amount to a delivery and actual change of possession within the Chattel Mortgage Act ; and because evidence was admitted to impeach Shoemaker's title after the plaintiff's counsel had consented to start with an admission of title in Shoemaker ; and because the verdict is against law and evidence, there being no evidence of actual change of possession of the timber, and that the evidence showed the transaction was not *bonâ fide*. He cited *Bank of Australasia v. Harris*, 6 L. T. Rep. N. S. 115 ; *Bills v. Smith*, 34 L. J. N. S. Q. B. 68.

In this term *Freeman, Q.C.*, showed cause.

DRAPER, C.J., delivered the judgment of the court.

The 4th sub-section of section 8 of the Insolvent Act of 1864 (27 and 28 Vict. ch. 17) appears to us the one requiring consideration in this case, though we do not desire to be taken as deciding that the preceding sub-section might not be found applicable also.

The 4th sub-section is : " If any sale, deposit, pledge, or transfer be made by any person in contemplation of insolvency, by way of security for payment to any creditor, or if any *goods*, effects, or valuable security be given *by way of payment* by such person to any creditor, *whereby such creditor obtains* or will obtain *an unjust preference over the other creditors*, such sale, deposit, pledge, transfer, or payment shall be null and void, and the subject thereof may be

recovered back for the benefit of the estate by the assignee in any court of competent jurisdiction; and if the same be made within thirty days next before the execution of a deed of assignment, or the issue of a writ of attachment under this Act, it shall be presumed to have been so made in contemplation of insolvency."

The interpleader issue states the assignment to have been dated on the 14th of April 1865. The delivery of the timber to the plaintiff was made, according to the evidence, on the 11th of the previous month, and therefore not within the thirty days; and hence the statutory presumption that the delivery was made in contemplation of insolvency does not arise. The only consequence of this, we take to be, that the defendant must give proof to establish such contemplation.

It will not, we presume, be questioned that the plaintiff was a creditor of the insolvent, for he had advanced to the insolvent moneys upon the faith of the contract of the 25th of November 1864, by which the insolvent undertook to make and deliver to him a large quantity of timber. His advances, according to the terms of that contract, would on the 1st of March 1865 have amounted to \$4500.

As to Shoemaker's position, on the 14th of December 1864 he had mortgaged his chattels to Lyons to secure him \$6000 for goods to be advanced and for other demands, and he had on the same day assigned to Lyons the standing timber on the three lots. On the 27th of February 1865, after the timber was cut, he had formally delivered it into the hands of Lyons' son for his father's use, and does not appear to have interfered with it afterwards. He requested Lyons' son to write to the plaintiff, and on the 1st of March a letter was written, stating that Shoemaker was desirous of delivering the timber to the plaintiff, but was afraid of his creditors, some of whom, it was stated, had refused to wait on him until he could complete the contract *and had commenced actions*; that Shoemaker and Lyons' son had consulted together, and had concluded that the better way would be to advise the plaintiff of the difficulty, *with a view to his anticipating the action of the creditors* by closing up the transaction and taking a delivery of the timber before

they could throw any obstacles in the way, adding, "whatever is to be done must be done before the 14th inst.; therefore whoever comes should come clothed with full power to act promptly." An agent came from the plaintiff on the 9th, who on the 11th took a delivery of the timber then at Big Creek, and on that day paid Lyons \$6500 in full, as we understand, of his demands upon Shoemaker, and who also paid Shoemaker \$4500 in satisfaction of his claims under the contract.

It is a significant feature of the transaction that Lyons commenced an action against Shoemaker on the 3rd of March, telling him it was to secure precedence, and a writ of execution was issued, we assume in this suit, under which the sheriff seized the timber as Shoemaker's; and the seizure was not abandoned until the 1st of July, though the sheriff permitted Lyons to run it to Port Rowan Bay, pursuant to a contract made by him with the plaintiff on the 7th of April. If the sheriff seized the timber before the 11th of March, Lyons' action must have been expedited by Shoemaker's acquiescence.

These facts afford, at least, evidence that Shoemaker transferred this timber to the plaintiff in contemplation of insolvency, though he deferred executing the voluntary assignment under the Insolvent Act of 1864 until the 14th of April, thirty-four days after the transfer. As already pointed out, he was entitled under the contract to \$4500, \$1500 of which were paid down, the remaining \$3000 being payable by two instalments on the 15th of January and 1st of March. The actual state of his account with the plaintiff when the delivery of the timber took place was not shown.

It is clear Lyons was a creditor of Shoemaker's, and that he was paid in full. The plaintiff was also a creditor to the amount of his advances. The transfer of the timber operated, and was meant to operate, by way of payment to Lyons and the plaintiff, and it is fairly deducible from the evidence that this was accomplished by a mutual arrangement between Shoemaker and these two creditors. Shoemaker expressly admitted that he was insolvent at the time,

though he says he did not know it; but the letter of the 1st of March (a copy of which was received in evidence by mutual consent), and Shoemaker's statement to M'Donald on the 2nd of March that \$28 was all he had to pay his men, afford evidence that if not then aware of actual insolvency, he had reason to contemplate its near approach, for excepting this timber he does not appear to have possessed much means of paying anybody.

Then under the 4th sub-section of section 8, above quoted, the knowledge of the plaintiff of Shoemaker's inability to pay his debts, or of a fraudulent intention on his part to impede, obstruct, or delay his creditors, is not material to make the transfer null and void, and even the existence of a fraudulent intent is not necessary under this sub-section. It presents, as applicable to this case, no other question than whether Shoemaker in contemplation of insolvency gave this timber by way of payment to the plaintiff, whereby he obtained an unjust preference over the other creditors. We take the policy of the Act to be to distribute the insolvent's effects rateably among all his creditors; and that if one of them obtains payment in full by the means stated in this 4th sub-section while the others get nothing, it is an "unjust preference," contrary to its letter and true spirit.

We do not find on the learned judge's notes that the plaintiff's counsel consented at the trial to start with an admission of the title of Shoemaker, and the putting in evidence the various deeds and agreements would seem to be inconsistent with such admission, or at least superfluous. Both parties claimed under him, and the plaintiff, though his agent got the delivery of the timber from Lyons' son, took it under, though in anticipation of, the time fixed by the contract of the 25th of November 1864. Lyons by seizing it under execution as Shoemaker's property affirmed his right, and the dealing between Lyons and the plaintiff tended to the same result. It was not and could not, we think, be successfully urged that the plaintiff was a purchaser of the timber except from Shoemaker.

We have not adverted to the Chattel Mortgage Act, nor to the Consol. Stat. U. C. ch. 18, sec. 57, or ch. 26, sec. 18,

because we think this case wholly turns on the Insolvent Act of 1864.

If we understand rightly, the two first objections set out in the rule were substantially the same as those taken at the trial, after hearing which the learned judge called back the jury and made further observations to them, to which no exception was taken.

On the whole, we think there should be a new trial, costs to abide the event.

Rule absolute.

FOWLER v. PERRIN, WESTBROOK, AND DOUGLAS.

Promissory note—Release of surety—Replication, mistake in the release—Words added after signature to deed, effect of.

Declaration on a promissory note made by defendants P., W., and D., jointly and severally, payable to plaintiff.

Equitable pleas. 1. By defendant D.—that he made the note as surety for defendant P., of which the plaintiff was aware when he took it, and that after it became due the plaintiff, without his knowledge, by deed released P. therefrom. 2. By defendant W.—that he and defendant D. made the note for the accommodation of P., as his surety, to secure a debt due to the plaintiff solely from P.; that it was delivered to and accepted by the plaintiff from the defendants upon an express agreement that W. and D. should be liable only as sureties; and that the plaintiff, without W.'s consent, by deed released P.

Equitable Replications.—1. That the pleas each refer to the same deed; that at the time of making it P. was indebted to the plaintiff in \$250 on an account stated, as well as for the amount of the note; that it was intended and agreed only to release the \$250, and not the note; that for the purpose of so confining the deed the plaintiff added after his signature thereto, “\$250, not any sureties on this;” and that the note was not included, or intended by defendant P., or by the plaintiff to be included, in the debts released by the deed.

2. That the release was drawn and executed by mistake, the intention of the parties thereto being to execute a consent only to a discharge of P. under the Insolvent Act of 1864, and it should have been drawn so as to operate in that way only, and not as a discharge of any sureties.

Held, on demurrer, that at law the first replication would be bad, for the words added formed no part of the release, and it therefore set up oral matter to qualify the deed; but that on equitable grounds it was sufficient. *Held*, also, that the second replication was bad.

DECLARATION.—That the defendants, on the 16th of December 1864, by their promissory note now overdue, jointly and severally promised to pay to the plaintiff the sum of \$1314 three months after date, with interest thereon at the rate of twelve per cent. per annum, but did not pay the same.

Plea, by the defendant Douglas, on equitable grounds, that he made the said note, securing the said sum of \$1314 with Abraham Westbrook, one of the other defendants, as surety only for the due payment thereof by the defendant Thomas Perrin, junior, the other maker of the said note, and not as a principal, of which the said plaintiff had full knowledge and notice before he took the same; that after the said note became due, and before the commencement of this suit, the plaintiff, being still the holder of the said note, without the knowledge or consent of the said John R. Douglas, by deed released the defendant Thomas Perrin, junior, therefrom; by reason whereof the defendant John R. Douglas, as such surety as aforesaid, became and was and is in equity and good conscience discharged from all liability on the said note.

Plea, by the defendant Abraham Westbrook, on equitable grounds, that the said defendants Abraham Westbrook and John R. Douglas respectively made the said note at the request of and for the sole accommodation of the defendant Thomas Perrin, junior, jointly, as the surety only of the defendant Thomas Perrin, junior, to secure a debt due to the plaintiff solely from the said Thomas Perrin, junior, and save as aforesaid there never was any value or consideration for the defendants Abraham Westbrook and John R. Douglas making the said note, and the said note was delivered to the plaintiff and accepted by him from the defendants upon an express agreement between them that the defendants Abraham Westbrook and John R. Douglas should be liable thereon as surety only for Thomas Perrin, junior. And the plaintiff at the time the said promissory note was made as aforesaid had notice and knowledge of the same having been so made by the defendants as such sureties as aforesaid. And the plaintiff, whilst the holder of the said note, without the consent or knowledge of the defendant Abraham Westbrook, after the alleged claim accrued, and before this suit, by deed released the defendant Thomas Perrin therefrom.

Replications, upon equitable grounds, to the respective pleas of the defendants Abraham Westbrook and John R. Douglas:—

1st, That the said pleas each refer to the same deed, and that at the time of the making of the said deed the defendant Thomas Perrin, junior, was indebted to the plaintiff in the sum of \$250 for money found to be due from him to the plaintiff upon an account stated between them, as well as in the amount of the promissory note in the declaration mentioned, and that at the time of the execution of the said deed it was intended and agreed by and between the said Thomas Perrin, junior, and the plaintiff that the plaintiff was only to release the said Thomas Perrin, junior, from the said debt of \$250, and not from the said promissory note, and that the said deed should only operate as a release of the said debt of \$250, and not of the said note; and the plaintiff accordingly executed the said deed, and added the figures "\$250," and the words "(not any sureties on this)," after his signature, for the purpose of confining the operation of the said deed to the said debt of \$250 only; and that the amount of the said promissory note was not included, or meant by the defendant Thomas Perrin, junior, or by the plaintiff to be included, in the debts released by the said deed.

2nd, A further replication, upon equitable grounds, to the said pleas of the defendants Westbrook and Douglas—that the said deed was drawn up and executed by mistake, the real agreement and intention of the parties thereto being to execute a consent only to a discharge of the said Thomas Perrin, junior, under the provisions of the Insolvent Act of 1864, and the said deed should, in pursuance of the said agreement and intention, have been drawn so as to operate only as such consent, and not as a discharge of any sureties.

M. C. Cameron, Q.C., for the demurrer, cited *Price v. Barker*, 4 E. & B. 760; *Cheetham v. Ward*, 1 B. & P. 630; *Nicholson v. Revill*, 4 A. & E. 675; *Perez v. Oleaga*, 11 Ex. 506; *Teede v. Johnson*, *Ib.* 840.

[*Hagarty, J.*, referred to *Coulson v. Macpherson*, 23 U. C. R. 129.]

Miles O'Reilly, Q.C., contra, cited *Payler v. Homersham*, 4 M. & S. 423; *Lampon v. Corke*, 5 B. & Al. 606; *Lindo v. Lindo*, 1 Beav. 496.

DRAPER, C.J., delivered the judgment of the court.

The question presented by the first replication, which is pleaded by way of answer to the defendants' pleas of a general release of one joint maker of the note sued upon, resolves itself merely into a question of construction.

The pleas assert that the two defendants pleading joined as makers merely in the character of sureties for the third maker; that the plaintiff knew this, and absolutely released the principal from all debts by a deed. The replication admits the execution of such a deed, but adds, that annexed to or directly following his signature thereto were the words and figures "\$250, not any sureties on this;" and the plaintiff avers that the amount sued upon was not included or meant to be included in the debts released by the deed, either by himself or by the releasee, the principal maker of the note.

The inquiry is whether this is a good replication at law or in equity.

First, at law. We must give to the release, such as these pleadings disclose it, its legal effect; that is, as a release containing general words sufficient to include this note, unless they are restrained in their operation by what the replication discloses. In that view we do not see why it was considered necessary to reply on equitable grounds. The same principles obtain in courts of equity and of law as to the construction of deeds; and if the words relied upon have the qualifying effect on the general words of release, which the plaintiff contends they have, then the same construction of the deed would be arrived at by either court.

The plaintiff relies principally on *Payler v. Homersham*, 4 M. & S. 423 (and see *In re Neal*, 4 Jur. N. S. 6), in which case the defendant compounded with his creditors, and it was recited in the deed of composition that he was indebted to his creditors in the sums set against their respective names, and that they had agreed to accept 15s. in the pound on the whole of their respective debts; and the release, in consideration of the 15s., was general. The defendant owed the plaintiffs on his own account the full sum set against their signatures to the release. He was also

indebted to them upon a bond entered into by him as a surety for a third party, and being sued upon this bond pleaded the release, to which the plaintiffs replied, setting out the foregoing facts, and that the moneys due on the bond were not intended to be included in the release. The plaintiffs got judgment, on the ground that general words of release may be restrained by a particular recital. It will be observed that the deed was one of composition with creditors, unlike the deed now pleaded; and *Britten v. Hughes* (5 Bing. 460) shows that there are material considerations belonging to deeds of that character, as fraud upon the other creditors of the party released, which so far as we see do not apply to this case.

The construction of the deed in *Lampon v. Corke* (5 B. & Al. 606), which was not a case of composition, was also arrived at by reference to a recital contained therein.

It does not appear that the deed in question before us alludes to any particular debt. It contains an inherent admission that the principal maker of the note was indebted *thereon*, because the plaintiff released him, but it goes no further. The averments in this replication that there was another debt, and that the release was intended to apply to that exclusively, have no support from anything in the *body of the deed*; and unless the words and figures added to the plaintiff's signature are part of the deed, the defence amounts to the introduction of oral matter to qualify and restrain the sealed release, and therefore fails.

We do not mean to decide that if these words formed part of the deed, the court, in order to ascertain their meaning, would not receive evidence of the surrounding circumstances, in order to assist in the construction of it, because taken alone without such aid it might be found impossible to apply them; for although parol evidence cannot be used to add to or detract from the description in a deed, or to alter it in any respect, it is admissible to show all circumstances necessary to place the court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning (*Baird v. Fortune*, 7 Jur. N. S. 926).

But the release here is general, and the deed as a deed is complete before the words on which the replication depends are reached. It does not appear that the plaintiff had not executed it before he added these words to his signature—words ambiguous at the best, perhaps wholly unmeaning without the aid of extraneous facts; words which, to borrow the language of Alderson, B., in *Teede v. Johnson* (11 Ex. 843) are *res extantes*, sufficient at most to found a decree to reform the instrument, but not a part of it, so as to create an ambiguity, far less to restrain its plain intent and meaning without them. We think this replication is bad at law.

It remains to consider the replication on equitable grounds. The joint-accommodation maker says that the plaintiff, without his assent, by deed released the other maker, Perrin, the principal debtor.

The plaintiff replies that when he gave the release Perrin was indebted to him on a wholly different claim, on an account as well as on this note; and it was intended and agreed between him and Perrin that he should only release him from the claim on the account, and not from the note, and that the deed should only operate as a release of the account and not of the note, and that the amount of the note was not included or meant by Perrin or by him to be included in the debts released; and he explains the way in which he signed his name as above mentioned.

The defendant admits this is all true, but says it is no answer.

The replication might have been much better drawn, and perhaps should have said expressly, as it does inferentially, that the general words of release were used by mistake.

But the principle seems governed by the cases of *Vorley v. Barrett* (1 C. B. N. S. 225, 1856) and *Lyall v. Edwards* (6 H. & N. 347, 1861).

Martin, B., says in the latter case: "The replication is founded on the equitable doctrine that if a release is given for a particular purpose, and it is understood by the parties that its operation is to be limited to that purpose, but it

turns out that the terms of the release are more extensive than was intended, a court of equity will interfere and confine it to that which was in the contemplation of the parties at the time it was executed." That was a case between the same parties as the parties to the release.

Vorley v. Barrett is like this case, setting out a release to a third party, the principal debtor. The equitable replication explained that the release, though general enough to affect the claim in suit, was so worded in mistake and error, and only was intended to affect a wholly different claim. *Cresswell, J.*, says: "It is admitted that if the agreement" (containing the release) "does include the bill in question, it was a mistake, and that the plaintiff should in some way have the means of rectifying it." *Crowder, J.*: "It is said that if the plaintiff wants to avail himself of the fact that the written agreement does not truly represent the contract between the parties, he should go to a court of equity to get it reformed. The very object of the C. L. P. Act was to enable courts of law to administer equitable relief without driving parties to the useless and vexatious expense of proceedings in a court of equity."

In the case before us it is admitted that the plaintiff and Perrin only intended to release another debt and not this. It does not appear that there are other parties to the deed of release, or any particular equities to be adjusted. All we are asked to do under the C. L. P. Act is to hold that the defendants cannot be allowed to set up that release under the circumstances. A court of equity would, we presume, on the admission of all the parties to the deed, reform the instrument by restricting the general words; or would, on a bill stating substantially the facts in this replication, unconditionally enjoin a defendant from setting it up as an answer to a claim admitted to have been wholly outside its intended operation.

We think we must hold the first replication good.

The second replication is, we think, bad. It does not disclose facts on which this court could interfere, nor have we the proper parties before us interested under the alleged

release under the Insolvent Act, to administer the equities between them.

Judgment for plaintiff on demurrer to the first replication, and for defendants on demurrer to the second.*

WADDELL v. CORBETT ET AL.

Trespass—Pleading—New assignment.

Trespass quare clausum fregit. Pleas, by defendants C. and M., justifying under a writ of Hab. Fac. issued at the suit of defendant G., and delivered to C. as sheriff, who made a warrant to M. as his bailiff, under which M. entered and expelled the plaintiff. The plaintiff replied that defendant C. as sheriff executed the writ himself by entering and expelling the plaintiff before giving the warrant to M.

Held, on demurrer, replication bad, for that the plaintiff's proper course was to new assign, so as to enable defendants to justify or deny the real cause of action.

Trespass quare clausum fregit. First count, for entering into land and sawmill, etc., of the plaintiff, in the city of Kingston, and expelling the plaintiff, etc. Second count, for like trespasses, describing the premises as having a wharf and sawmill, and setting out the same by metes and bounds, etc.

Fourth plea. Defendants Corbett and Murray, as to the entering on the land and expelling the plaintiff, as in the first count mentioned, pleaded a justification under a writ of Hab. Fac. Poss., issued at the suit of the defendant Gay, and delivered to the defendant Corbett as sheriff, who made a warrant to the defendant Murray as his bailiff, and that Murray as bailiff entered into the lands in the first count mentioned, being the lands mentioned in the writ, and expelled the plaintiff, etc., which are the alleged trespasses in the introductory part of the plea mentioned, and whereof the plaintiff in his first count has complained.

Sixth plea. A like plea to the second count, by the same defendants.

Thirteenth plea. Defendant Gay, as to the entering, etc.,

* See Fowler v. Perrin et al., 16 C. P. 258.

in the first and second counts mentioned, and expelling the plaintiff, pleaded a justification, setting out a recovery in ejectment against the plaintiff, the issuing thereon of a *Hab. Fac. Poss.* directed to the defendant Corbett, Corbett's warrant to Murray, who executed the writ and put the defendant Gay into possession of the lands, etc., averring that these were the same trespasses mentioned in the introductory part of the plea, and of which the plaintiff complained in the first and second counts.

Replication to the fourth plea. The plaintiff as to the fourth plea says that after the suing out of the said court the said writ of *Hab. Fac. Poss.*, and after the said delivery of the same to the defendant Corbett, the defendant Corbett, so being such sheriff, while the said writ was in full force, and before the making and delivering of the warrant to the defendant Murray, executed the said writ of *Hab. Fac. Poss.*; and by virtue of the said writ then, and before the supposed execution of the said writ as in said plea mentioned, entered into the said land, etc., in the first count mentioned, and did then and there expel, etc., the plaintiff from the possession thereof, and thereby executed the said writ.

Replication to the sixth plea. Same as to the fourth plea; and to the thirteenth plea a similar one, adding, after the averment of expelling the plaintiff at the end, that the defendant Corbett put the defendant Gay into possession, etc.

Demurrer by the defendants Corbett and Murray to the replication to the fourth and sixth pleas, and by the defendant Gay to the replication to the thirteenth plea. The causes assigned were, that the replications were neither pleaded by way of traverse or confession and avoidance, nor by way of new assignment; that they offered no material issue; that they were repugnant and a departure, etc.

Gwynne, Q.C., for the demurrer, cited 1 Saund. 299, note 6, 299 *a.*, note *f.*, 300 *f. g.*, note *q.*, 300 *e.* Steph. Plg. 186; Saund. Plg. & Ev. ii. 432; B. & L. Prec. 543.

Sir H. Smith, Q.C., contra, cited Oakley v. Davis, 8 East, 82; Jones v. Williams, 8 M. & W. 349.

MORRISON, J., delivered the judgment of the court.

We are of opinion that our judgment should be for the defendants on all the demurrers.

The defendant Corbett by his fourth plea in effect says to the plaintiff: "By virtue of a writ which I received as sheriff, I made a warrant to Murray, my bailiff, who entered and expelled you by virtue thereof, and that is the trespass you complain of." The plaintiff in reply says: "Before you gave the warrant to Murray you entered and expelled me by virtue of that writ; in other words, True it is I was turned out legally under that writ, but since then you again entered and expelled me under colour of that same writ which you had previously executed."

The replication does not traverse the material fact in the defendants' plea, but attempts to show by implication that the defendants have mistaken the plaintiff's cause of action, the object of the pleader apparently being to put in issue by this mode of pleading that the defendants acted under a spent writ

If there were two trespasses, which we must infer from the replication, one which the defendants could justify and another which they could not, the whole course of authorities goes to show that the plaintiff ought to meet the plea by a new assignment, so as to allow the defendants an opportunity of answering by a justification, or not guilty, the real causes of action, whatsoever they may be. As said by Sir James Macaulay in *Hall v. Irons* (4 C. P. 357), if admitting the writ, etc., and that it did justify causes of action similar in their nature, but different in fact from those intended in the declaration, it seems to constitute a case in which a new assignment is clearly the proper course to be adopted. See the cases there cited. We refer also to *Groenvelt v. Burwell* (1 Ld Raym. 465), *Scott v. Dixon* (2 Wils. 4), and 1 Saund. 300 *a*.

It is laid down that where the plea covers the trespass but mistakes it, that is, *does not hit*, either wilfully or ignorantly, the whole or some part of the trespass which the plaintiff intended in his declaration, the plaintiff must new assign to explain (1 Saund. 299 *b*).

The replications to the sixth and thirteenth pleas are open to the same objections. We also refer to *Eberts v. Larned* (5 U. C. R. 264) and *Monkman v. Shepherdson*, 11 A. & E. 411.

Judgment for defendants on demurrer.

IN RE THOMPSON ET AL., AND WEBSTER, REGISTRAR OF THE
COUNTY OF WELLINGTON.

29 *Vict. ch. 24, sec. 73*—*Registry—Certificate of lis pendens—Land divided into village lots—Mandamus—Costs.*

The registrar was required to record a certificate of *lis pendens* affecting "lot number sixteen in the ninth concession of the township of Erin, and lots numbers fourteen and fifteen in the tenth concession of the same township," which he refused to do, as the west halves of lots fourteen and fifteen had been laid out into village lots according to a plan filed in his office. On application for a mandamus, *Held*, that so far as regarded the west halves he was right, for by the Registry Act, 29 *Vict. ch. 24, sec. 73*, the certificate should show the village lots affected.

The point being new, and there being no difficulty in recording the certificate against lot sixteen, the rule for a mandamus was discharged without costs.

Freeman, Q.C., obtained a rule calling on James Webster, Registrar of the County of Wellington, to show cause why a writ of mandamus should not issue, directing him to register a certificate of a deputy registrar of the Court of Chancery, which certificate was as follows:—

"In Chancery.—I certify that in a suit or proceeding in Chancery between William Thompson and John Burns, plaintiffs, and Charles M'Millan, the younger, Hugh M'Millan, Charles M'Millan, and Donald M'Bain, defendants, some title or interest is called in question in the following lands, viz. Lot number sixteen in the ninth concession of the township of Erin, and lots numbers fourteen and fifteen in the tenth concession of the same township.

"(Signed) WM. LEGGO,

"Deputy Registrar.

"Hamilton, 12th January, A.D. 1866."

Upon the same being presented to him, and his legal charges being paid; and why he should not pay the costs of this application.

From the affidavit and papers filed on moving the rule, it appeared that Mr. Proudfoot, the solicitor of the appli-

cants, on the 12th of January last forwarded by post to the registrar of Wellington the certificate referred to in the rule, with a fee of 50 cents, and requested him to register the same in his office; that on the 15th of the same month the registrar returned by mail the certificate to Mr. Proudfoot, stating in his letter that it could not be registered in its present form under the Registry Act of last session, 29 Vict. ch. 24, giving as a reason that so far as the greater parts of lots fourteen and fifteen in the tenth concession were concerned, they had been laid out as a village for many years, and the plans thereof duly registered, and that, in cases where plans had been so filed, under the 73rd section of that Act, instruments affecting the lands or any part thereof shall conform to such plans, and stating that it was out of his power to register the certificate in its present form. The registrar also stated that so far as lot sixteen in the ninth concession was concerned, no difficulty presented itself.

Mr. Proudfoot on the receipt of the registrar's letter re-enclosed the certificate to him, requesting him to register it, and the registrar again returned it and the 50 cents, declining to place it on record, upon which this application was made.

Gwynne, Q.C., showed cause for the registrar, and *Freeman, Q.C.*, supported his rule.

Upon the argument the following facts were admitted, being reduced to writing and signed by the counsel:—

That the village of Erin is an unincorporated village; that it comprises within its limits the east halves of lots numbers thirteen, fourteen, and fifteen in the tenth concession of the township of Erin; that maps or plans of the said several lots surveyed into village lots have been registered in the Registry Office of the county of Wellington by divers parties laying out such lands into village lots; that the west half of fifteen in the tenth concession is subdivided into 92 village lots, designated by appropriate numbers upon the map or plan thereof, which map was filed in the Registry

Office on the 21st of June 1858, and the west half of fourteen in the tenth concession is subdivided into 24 village lots, designated by appropriate numbers on the map or plan thereof, which was likewise filed in the Registry Office in 1858; that on the 3rd of January 1861 the Corporation of the Township of Erin filed in the said Registry Office a new map or plan, containing on the one map all the separate plans or surveys of the said village previously filed, including the plans of the west halves of fourteen and fifteen, pursuant to the provisions of Consol. Stat. U. C. ch. 89, sec. 79; that since the filing of the last-mentioned plan no index of the west halves of lots fourteen and fifteen in the tenth concession of Erin has been kept in the Registry Office, but all registries upon any part of those lots have been entered on the index kept of the plan, and of the numbers as designated therein; that the indices of the east halves of lots fourteen and fifteen in the tenth concession, not being within the village, are still kept as before, namely, as patented; that the applicants herein demanding registration of the *lis pendens* required the registrar to register it upon the west halves of fourteen and fifteen, as the same were patented, and the fee tendered was 50 cents; that sales have been made of lots as laid down on the plan, and the deeds registered in accordance with such plan.

MORRISON, J., delivered the judgment of the court.

The principal point arising for our determination is, whether it was the duty of the registrar to register the *lis pendens* in the terms in which it is expressed.

The Act of last session, chapter 24, repeals in express terms the former Registry Act, ch. 89, Consol. Stat. U. C., and several Acts in amendment of the same, with a saving clause providing that all registrations, official acts, records, matters, and things done in pursuance of any or either of the repealed Acts, shall, where they are valid and effectual at the time of the passing of the Act, remain and continue to be valid and effectual to all intents and purposes. And by the third clause so much of all other statutes, parts, and clauses of statutes as relates to the proof required for and

the mode of registration of instruments and the filing of plans are repealed.

The 78th section of the repealed Act, ch. 89, enacted that any person who surveys and subdivides any land into village lots differing from the manner in which such lands were described as granted by the Crown, shall lodge with the registrar a plan or map of such village lots, showing the numbers and ranges of such lots, and the names, etc., of the streets by which such lots may be in whole or in part bounded, etc.; and thenceforth the registrar shall keep an index of the land described in such map or plan as a village or part of a village. And by the 79th section it is provided that where an unincorporated village comprises different parcels of land owned at the original division thereof by two or more persons, and the same was not jointly surveyed and laid out into a village plot, and when no entire plan or map of the village has been deposited with the registrar, the municipality of the township within which the village is situate shall immediately cause a plan or map of such village to be made on the scale required by law, and to be deposited in the Registry Office of the county within which the village is situate.

A similar enactment is to be found in ch. 93, sec. 48, Consol. Stat. U. C., relating to survey of lands. Sections 39, 40, 41, and 42 of that Act also declare the mode by which plans of villages or original divisions thereof shall be surveyed, and the duty of the registrar upon the same being deposited in his office; and by the 43rd clause of that Act it is enacted that every registrar shall keep a separate book for the registering of title-deeds of lands situate in any such village, in the same manner as is by law required for registering title-deeds for lands situate in townships.

By the operation of these several enactments it appears very clear to me that up to the time the present law came into force it was the duty of the registrar to keep a book for the registering of title-deeds of lands situate in a village, in the like manner as that required for registering titles to lands in a township; that is, registering the instrument affecting any village lot in the Registry Book of the office

in the usual manner, and numbering it consecutively as received with other instruments affecting lands within the county, and also entering in the index-book required to be kept for each village (which index-book contained each lot designated or shown on the plan filed), opposite to each lot, a reference to each instrument registered affecting the same, so that upon turning to the index and referring to the number of the village lot there could be seen at once references to any instrument on registry, affecting it or any part of it, since the depositing of the plan.

Upon an examination of the repealed statutes, however, it will be seen that it was not imperative that instruments affecting the lands covered by such village lots should be registered in accordance with or conform to the plan lodged in the Registry Office; nor could the registrar refuse to register any instrument which on its face affected any township lot or a part thereof, and which could have been registered and indexed (if such village never had been laid out) as the same was patented.

The 73rd section of the Act of last session enacts that whenever any land or original township lot has been surveyed or subdivided into village lots, the person or corporation, etc., making such survey or subdivision shall within three months, etc., lodge with the registrar a plan or map of the same, showing the numbers, etc., of village lots and names of streets, etc., and thenceforth the registrar shall keep an index of the lands described or designated by any number or letter on such map or plan, by the name by which such person or corporation designates the same, in manner provided by the Act. And all instruments affecting the *land*, or any part thereof, executed after such plan, shall conform thereto, otherwise the same shall not be registered. And the clause is declared to apply to lands already surveyed and subdivided.

It is, we think, evident that the legislature by this clause, which contains the material parts of several of the provisions of the repealed Act, intended to remedy what was considered a defect as the law formerly stood, the want of uniformity in the registration of instruments affecting lands

originally township lots, and laid out into village lots, and making it compulsory upon persons claiming title to lands forming the site of a village, after the plan of the same has been duly prepared and deposited in the proper office, to register all instruments affecting any of such village lots in the same manner as if the village lots were from that time described as such in grants from the Crown, the chain of title and instruments affecting the land prior to the lodging of the plan being registered and indexed against the original lot as patented, in the manner provided for township lots; one of the objects the legislature had in view by compelling such a course of registry being to simplify the state of the title in the Registry Office; so that any owner, intending purchaser, or person interested in ascertaining the title to any particular village lot, could by a glance at the Registry index-book see from the references set against the particular village lot the instruments affecting it on registry since the date of the filing of the plan.

From the language of the 73rd section it is in our judgment very clear that, so far as the west halves of lots fourteen and fifteen in the tenth concession are concerned, every instrument affecting any of the village lots comprised within the limits of these half lots presented for registry must conform to the plan filed of record in the office; and that what is meant by the words "conform thereto," as used in the section, is, that the instrument must show on the face of it what particular village lots, and by their designation on the plan, it is intended to affect.

We are therefore of opinion that the registrar was not bound to register the *lis pendens* as far as the same related to the west halves of fourteen and fifteen in the tenth concession of Erin in the terms in which it is expressed; and that this rule should be discharged.

As to costs, the question being a new one, and the registrar admitting that so far as lot sixteen in the ninth concession was concerned no difficulty presented itself to the registering of the *lis pendens* as against that lot, the rule will be discharged without costs.

Rule discharged without costs.

LESLIE v. EMMONS ET AL.

County Court—Death of judge—Effect of on rules pending—Alteration in note—Pleading.

A rule to enter a nonsuit having been granted in the County Court in April term, was duly enlarged until the following term. The judge died before that term began, and no successor was appointed till after its expiration, but the clerk of the court granted a rule to enlarge it. It was argued in October term before the new judge, who treated it as still pending, and gave judgment. *Held*, that he was right. The plaintiff declared upon a note as made by the defendants jointly and severally. *Quære*, whether the interlineation of the words "jointly and severally," of which no explanation was offered, could be taken advantage of under *non fecit*, or whether a special plea was requisite.

APPEAL from the County Court of Hastings.

The plaintiff declared as payee of a note made by the two defendants, jointly and severally, with a third person. *Plea*, *Non fecit*, by each defendant separately.

At the trial the handwriting was proved. It had stamps on it initialed by the payee to double the necessary value, but no proof was given as to when they were affixed.

A number of elaborate objections were taken on motion for nonsuit: in substance, that the stamps were not duly affixed, and that on the face of the note the words "jointly and severally" were interlined, and no explanation offered respecting it.

There was a verdict for the plaintiff, with leave reserved to enter a nonsuit.

The case was tried before a judge since deceased, and it did not appear from his notes that anything was left to the jury or any direction given to them.

In the following April term a rule for nonsuit was moved on a series of voluminous objections, which, it was remarked by the court above, might have been as intelligibly expressed in as many lines as there were folios of writing.

This rule was duly enlarged to the ensuing term of July. The judge died before that term, and no successor was appointed till its expiration. The clerk of the court, however, granted a rule to enlarge it; and in October term the rule was argued before the new judge, the plaintiff protesting against his taking cognizance of it, and insisting that it was a lapsed rule. The learned judge considered the rule still pending.

As to the objection on the Stamp Act, he ruled that a plea was necessary to raise the point. But as to the unexplained interlineation, he held it was fatal to the plaintiff's right to recover, and that it could be taken advantage of under *non fecit*; and he made the rule absolute to enter a nonsuit.

The plaintiff appealed.

Jellett, for the appellant, cited *Tay. Ev. sec. 1616*; *Bishop v. Chambre*, 3 C. & P. 55; *Taylor v. Mosely*, 6 C. & P. 273; *Hemming v. Trenery*, 9 A. & E. 926; *Mason v. Bradley*, 11 M. & W. 591; *Chit. Com. L.*, ed. 1864, vol. ii. p. 783.

C. S. Patterson, contra, cited *Davidson v. Cooper*, 11 M. & W. 778; *Cock v. Coxwell*, 2 C. M. & R. 291; *Perring v. Hone*, 2 C. & P. 401; *Baxter v. Baynes*, 15 C. P. 237.

HAGARTY, J., delivered the judgment of the court.

We see no reason to question the learned judge's decision in treating the rule as still pending. The reason of the thing and the necessity of the case are in favour of his view. The plaintiff's argument would go the length of holding that the death of the judge would render void or impossible everything requiring to be done as of that term; that in fact as a Court of Record it would be extinct. We think the rule was to be disposed of in due course in the following term, and the clerk's act in issuing a rule would preserve the *prima facie* regularity of the proceeding.

Whether the objection as to the interlineation required a special plea is a point involved in much doubt, and the text writers differ in their view.

Taylor on Evidence, section 269, says: "So, in conformity with the rule of law established by the cases of *Hemming v. Trenery* (9 A. & E. 926) and *Davidson v. Cooper* (11 M. & W. 787), a defendant, under a plea that he did not make the note or accept the bill, cannot set up a defence that the instrument has been subsequently altered, unless the alteration is such as to render the stamp insufficient. Some doubts may be entertained whether this rule would prevail in cases where the plaintiff declares on the instrument *as altered*; for although this appears to have been the form of

the declaration in *Parry v. Nicholson* (13 M. & W. 778) the attention of the court was not drawn to that fact, the alteration being in truth an immaterial one."

In Byles on Bills, ed. 1862, p. 303, it is said: "It is conceived, notwithstanding some recent cases, that the alteration of a bill or note need not, when the plaintiff declares on the instrument in its *altered state*, be specially pleaded. When altered it is no longer the same instrument that the defendant signed, and moreover there is no stamp applicable to the altered instrument, so that it cannot be looked at by the jury to prove the new contract."

In the last edition of Chitty on Bills, 1859, p. 381, the rule is qualified thus: "It is submitted that the rule laid down on this question by a learned text writer" (Byles), "viz. that an alteration need not be specially pleaded when the plaintiff declares on the instrument in its altered state, requires qualification. . . . The rule would seem to be, that when the plaintiff so declares on the instrument that he must prove it in its altered state, the defence is open to the drawee under *non accepit*; for then it may be said, as was observed by *Alderson, B.*, in *Cock v. Coxwell* (2 Cr. M. & R. 291), 'He has pleaded it specially by saying that he did not accept the bill you declared on and produced in evidence, but a different one.'"

The latest case to be found seems to be *Parry v. Nicholson* (13 M. & W. 778). There the bill was declared on as dated 22nd March, payable at three months from date. When produced it was found the date had been altered from the 2nd to the 22nd. It was objected that this objection required a special plea, and could not avail on *non accepit*. The court in term held that as a special plea was necessary, the date was immaterial, *Parke, B.*, saying, "When it is produced in evidence it is such a bill as the one described. . . . The plaintiff is to explain it if the issue in the cause makes it material. . . . We concur in the decision in the case of *Hemming v. Trenery*," and also *Mason v. Bradley*, and *Davidson v. Cooper*: "We have none of us the slightest doubt upon the point."

It is not easy to see how the date of a bill is immaterial.

It accelerates or delays the time of payment and the time for notifying the indorser, etc. It might perhaps be urged here that the words "jointly and severally" do not on the issue of *non fecit* make any material difference. The defendants sued would be equally liable on a joint note if they did not plead the non-joinder.

The law seems in a most unsatisfactory state on the authorities.

When evidence is given as to the alteration, it becomes a question for the jury. In the absence of any explanation, it seems there is nothing to be left to the jury on the mere inspection of the instrument (*Knight v. Clements*, 8 A. & E. 215; *Taylor on Evidence*, sec. 1616).

But the case before us is very peculiar. We have been shown a photograph of the note. It is a printed form: "—— after date, for value received," — "promise to pay," leaving a very small space for the word "I" or "we," so that for a note intended to be joint and several it was absolutely necessary to interline the words; and this would seem to lessen the presumption of anything being wrong.

We think, on the whole, that the safer course would be, instead of ordering a nonsuit, to direct a new trial without costs. The judge's death has deprived us of any insight into his direction to the jury. The parties now see the difficulties on either side. The defendant (if so advised) may apply to add any pleas putting on record his objections on the Stamp Act, or as to the alleged alteration, and the plaintiff very possibly can be prepared with fuller evidence on both these points.

We feel a great difficulty in reconciling the decision in *Parry v. Nicholson* with the opinions of some of the text writers. As long as it stands unreversed, it seems to us difficult to say that a special plea is not necessary in a case like the present. The reason of the thing would seem to be that *non fecit* expressly puts in issue that defendant made the note declared on.

We think the most discreet course will be to allow the appeal, and direct a new trial without costs to allow the facts to be more fully investigated.

Appeal allowed.

HARRIS v. ROBINSON ET AL.

County Court—Appeal—Practice—Costs.

The judge of a County Court granted a second new trial, saying that he did so with hesitation, and expressing a hope that the defendant would appeal in order to test the propriety of his course. This court, although thinking that it would have been better to let the verdict stand, declined to interfere with the discretion of the court below on the evidence; but as the defendant might be said to have appealed in compliance with the wish of the learned judge, the appeal was dismissed without costs.

APPEAL from the County Court of the County of Peterborough.

Galt, Q.C., for the appellant, *Robert A. Harrison*,
contra.

It is unnecessary to state the facts of the case further than they appear in the judgment.

HAGARTY, J., delivered the judgment of the court.

This is an appeal by the defendants in an action on a note, against an order of the learned judge of the County Court, setting aside a second verdict for the defendants.

The learned judge states that he exercises his discretion in setting aside the second verdict with hesitation, and expresses a hope that an appeal may be lodged to take the opinion of this court on the propriety of his doing as he has done. We do not think that our appellate jurisdiction is properly claimable (except perhaps in an extreme case) to review the exercise of such a discretionary power as the granting of a new trial on a review of all the evidence. We do not dissent from the learned judge's view of the law of the case, and see no ground for our interference on any alleged legal right of the defendants to hold their verdict on the evidence. We do not consider that in such a case the court below should have felt bound to interfere after two verdicts for the defendant. The case was twice left to the jury in a manner the plaintiff could not complain of. Each time the jury took a view unfavourable to the plaintiff's right.

In our view the matter might have been more judiciously considered as concluded by the second verdict. But, as

already noticed, we decline reviewing any such exercise of the judge's discretion, and therefore hold that the appeal must be dismissed; but as the defendant may be said to have appealed in compliance with the express desire of the court below, we think it should be without costs.

Appeal dismissed without costs.

BRUNSKILL *v.* WILSON ET AL., EXECUTORS OF CHRISTOPHER WIDMER.

Covenant for title—Action on, for equitable defect—Purchase by trustee from cestui que trust—Pleading.

The declaration alleged that W. (defendant's testator), by indenture made under the Act, conveyed certain land to the plaintiff in fee, covenanting for right to convey, and that he had done no act to encumber; and assigned as a breach that before the execution of said deed the title was vested in the Bank of Upper Canada, who conveyed to W., being then a director and vice-president of, and as such a trustee for, the said bank—by reason whereof the said W. had not good right to convey, and the said lands were impeached in title and estate, and afterwards many persons to whom the plaintiff had agreed to sell parts of said land refused in consequence thereof to perform their contracts; and the Court of Chancery, in a suit duly instituted, thereupon decreed the plaintiff's title to be defective for this cause, whereby the plaintiff was unable to enforce said agreements, or to sell the land, etc.

Held, on demurrer, that the declaration showed no cause of action, for (among other reasons) the legal estate passed to the plaintiff, the defect alleged being an equitable one only; no eviction or disturbance was shown; and the alleged proceedings in Chancery would not compel a court of law to hold the title bad.

DECLARATION.—For that by Indenture of Bargain and Sale, under the hand and seal of the said Christopher Widmer, in his lifetime, bearing date the 3rd day of December 1856, and expressed to be made in pursuance of the Act to facilitate the conveyance of real property between him, the said C. W., of the first part, H. W., his wife (for the purpose of barring her dower), of the second part, and the plaintiff, of the third part, it is witnessed, in consideration of the sum of £12,500 of lawful money of Canada, then paid by the plaintiff to the said C. W., the receipt whereof is thereby acknowledged, that the said C. W. did grant unto the plaintiff, his heirs and assigns, to hold to his and their sole and only use for ever, all and singular, etc. (describing the land in the city of Toronto.)

And the said C. W., in and by the said indenture, covenanting with the plaintiff that for and notwithstanding any

act, deed, matter, or thing by him done, executed, committed, or knowingly or wilfully permitted or suffered to the contrary, he, the said C. W., then had in himself good right, full power, and absolute authority to convey the said lands, and other the premises thereby conveyed or intended so to be, with their and every of their appurtenances, unto the plaintiff, in manner aforesaid, and according to the true intent of the said indenture ; and that he, the said C. W., had not at any time theretofore made, done, committed, executed, or wilfully or knowingly suffered any act, deed, matter, or thing whatsoever, whereby, or by means whereof, the said lands and premises thereby conveyed, or intended so to be, or any part or parcel thereof, then were, was, or should or might be in any wise impeached, charged, affected, or encumbered in title, estate, or otherwise howsoever. And the plaintiff avers that he agreed to purchase the said parcel of land from the said C. W. for the consideration aforesaid, and took the said deed of bargain and sale thereof, for the purpose and with the intent of subdividing and laying the same out into town lots for building purposes, and of reselling the same at a profit to persons desirous of acquiring such building lots, as the said C. W. at the time of the said purchase and of the execution of said indenture well knew ; that after obtaining the said deed the plaintiff accordingly, relying upon the said indenture, and that a good title to said lands was conveyed to him thereby, caused the said parcel of land to be laid out into such building lots, and expended large sums of money in and about the surveying and laying out the same, and in excavating and making roads and streets throughout the same, and in causing plans to be made thereof, and other things necessary for the purpose aforesaid.

And for assigning a breach of the said covenants, the plaintiff saith that before the execution of the said indenture of bargain and sale to him, the title to the said lands being vested in the Bank of Upper Canada in fee, the said C. W. had bargained for and obtained and procured a deed of bargain and sale, purporting to convey the said lands to him, from the said the Bank of Upper Canada, and that the said C. W. never had any right, title, or claim to the said lands, or any part thereof, otherwise than under or by virtue of the said last-mentioned deed of bargain and sale ; that before the execution of the said last-mentioned deed the said C. W. had been and was elected a director of the said Bank of Upper Canada, and had been and was appointed to and accepted the office of vice-president thereof, and acted in and performed the duties pertaining to such office, and as

such was a trustee of and for the said bank; that up to and at the time the said C. W. so bargained with the said bank for the said lands, and obtained the said deed of bargain and sale from them as aforesaid, and afterwards, he continued to fill, and did fill, the said office of vice-president of said bank, and perform the functions thereof, and knowingly and wilfully acted as such when the said bargain was made by him with the said bank for said lands, and when the said deed of bargain and sale thereof was so procured by and granted to him as aforesaid, and by reason thereof was then a trustee for said bank—whereby, and by reason of the acts of the said C. W. in so accepting and filling the said office of vice-president of said bank, and acting therein as aforesaid at the time of the said bargain and sale to him by said bank, and of his so procuring and obtaining the said deed when he was and acted as such vice-president and trustee as aforesaid, he, the said C. W., had not at the time of the execution of the said indenture of bargain and sale by him to the plaintiff good right, full power, or absolute authority to convey the said lands, and other the premises by said indenture conveyed or intended so to be, to the plaintiff, with their appurtenances, or any part thereof, in manner aforesaid, or according to the intent of such indenture; and that by reason of the said acts of the said C. W., and the matters and things by him as aforesaid committed, and wilfully and knowingly suffered, the said lands and premises, and every part thereof, so intended or purported to be conveyed by the said C. W. to the plaintiff, as aforesaid, were and thereafter continued to be impeached and affected in title and estate. And afterwards divers persons with whom the plaintiff had entered into agreements, at a large profit to him, for the sale of certain of the said building lots so laid out by the plaintiff as aforesaid, refused specifically to perform or carry out the said agreements in consequence of the defect in the plaintiff's title to said lands, by reason of the said acts of the said C. W. and the premises aforesaid; and the Court of Chancery for Upper Canada, in a suit duly instituted in said court, thereupon decreed the plaintiff's title to be defective and bad for the cause aforesaid, whereby the plaintiff was unable to enforce said agreements, or thereafter to sell or dispose of any of the said lots, and the plaintiff not only lost the purchase-money of said lands and the money so expended by him in subdividing and laying out the same into building lots as aforesaid, but also divers large profits which he might and otherwise would have acquired from the resale thereof.

Demurrer, on the grounds, 1. That the declaration alleges a conveyance from the Bank of Upper Canada to the testator, and does not show that such conveyance was inoperative to vest the fee in the testator.

2. That it is not shown that the testator was before his purchase from the Bank of Upper Canada a trustee in respect of the lands in question, or that as vice-president of the said bank he did or was required to do any act with respect to the said lands, or to the sale or conveyance thereof.

3. That if it is intended to be alleged that the said testator, after the conveyance to him from the said bank, held the said lands as trustee, it is not shown that as such trustee he was not empowered to sell and convey to the plaintiff.

4. That it is not alleged that the plaintiff had notice of the alleged trusts, or was affected thereby.

5. That the alleged acts of the testator do not constitute any breach of the alleged covenants.

6. That the alleged defects in title are only defects in equity and not at law, and it is not shown that the title of the plaintiff or of the testator has been impeached or questioned by any proceeding in which the testator, or the defendants, or the said bank, or any person in privity with any of them, was a party.

Strong, Q.C., for the demurrer, cited Lewin on Trusts, 335; *Hunt v. Danvers*, Sir T. Raym. 370.

C. S. Patterson, contra, cited *Hobson v. Middleton*, 6 B. & C. 300; *Kenrick v. Beauchlerk*, 11 East, 663; *Carlisle v. Orde*, 7 C. P. 456; *Prindle v. M'Can*, 4 U. C. R. 228; *Vanderburgh v. Vanalstine*, 5 O. S. 454; *Delmer v. M'Cabe*, 14 Ir. C. L. Rep. 377; *Brunskill v. Clarke*, 9 Grant, 430; *Clarke v. Hawke*, 11 Grant, 527; *Rawle on Covenants for Title*, 105, 106.

DRAPER, C.J.—The declaration sets up the following case: That the title to the lands mentioned therein was in the Bank of Upper Canada, who agreed to make, and did make, a conveyance thereof to the defendants' testator, he being at the time of the bargain and conveyance and afterwards a director and the vice-president of the bank. The date of this transaction is not stated, but after some unascertained interval the testator, by indenture dated the 3rd of

December 1856, in consideration of £12,500, conveyed the same lands to the plaintiff, to hold to the sole and only use of the plaintiff, his heirs and assigns for ever, and thereby covenanted that he had good right, full power, and absolute authority to convey, and that he had not at any time theretofore made, done, committed, executed, or wilfully or knowingly suffered any act, deed, matter, or thing whatsoever, whereby or by means whereof the said lands were or should be impeached, charged, affected, or encumbered in title, estate, or otherwise howsoever. Then it is averred that the testator had no other right to the lands except the deed from the bank, and that being, under the facts stated, a trustee for the bank, he had not at the execution by him of the indenture to the plaintiff good right, full power, or absolute authority to convey the lands so intended to be conveyed to the plaintiff according to the said indenture, and for the like reason the lands so intended to be conveyed were and thereafter continued to be impeached and affected in title and estate; and afterwards certain persons to whom the plaintiff had sold parcels of the same land refused to perform their agreements with the plaintiff in consequence of the defect of the plaintiff's title by reason of the premises; and the Court of Chancery "in a suit duly instituted in the said court thereupon decreed the plaintiff's title to be defective and bad for the causes aforesaid."

On this declaration we must assume that the Bank of Upper Canada had the legal estate in these lands and conveyed that legal estate to the testator. The plaintiff has not assigned the breach by negating the words of the covenant, but he has stated certain facts, which he contends constitute a breach sufficient to enable him to maintain this action. He does not assert that the covenant is broken, except so far as these facts show. The question, then, is, do these facts show a legal cause of action? Very possibly, on the state of facts alleged to exist at the date of that conveyance, the bank could have avoided it. If the fact were, and I apprehend that is what was intended to be averred (whether it is so averred being another question), that the testator, being a trustee, purchased from his *cestui que trust*,

the Court of Chancery would on well-settled principles have granted relief to the bank. But nothing is shown from which we can even surmise that the bank complains or seeks relief. Consistently with all that is stated, the bank itself might have been only a trustee to sell, and might have made the conveyance to the testator in pursuance thereof, so that he would not be within the rule that a trustee cannot sell to himself, and so fulfil two inconsistent characters, buyer and seller, in which *emptor emit quam minimo potest, venditor vendit quam maximo potest*. It does not appear from the declaration that the testator was a trustee for sale.

There is no averment, nor can it be assumed, that the bank have ever raised any objection to the conveyance of the testator, if it is to be assumed that they have the power to object, or to follow the property, or the proceeds of a sale thereof. It is possible that their conveyance to the plaintiff was made so long ago that the lapse of time will afford evidence of acquiescence. The fact that the testator, if a purchaser, was one of their directors and their vice-president must have been known to all the parties at the date of the conveyance. (See Sug. V. & P. ch. 20, 13th ed.) In order to maintain this action on the alleged breach of the first covenant, it must be made to appear that no title passed to the testator, and therefore he could convey none; whereas it appears to me that on the declaration the legal estate did pass, and is now vested in the plaintiff.

I have not overlooked the statement in the latter part of the declaration, that the Court of Chancery have decreed the plaintiff's title to be defective and bad. If it was further shown that the Court of Chancery had annulled the deed executed by the bank, and had declared that under it the testator was only a trustee for the bank, or that the plaintiff took nothing by the conveyance to him, it might perhaps have been different. But I apprehend this court cannot take notice that the Court of Chancery might or would have made the testator a trustee for the bank of these lands (see *Hobson v. Middleton*, 6 B. & C. 299), and as a consequence hold that the testator's covenant was broken. We have no ground for holding that the bank was a party to the suit, or is bound by the alleged decree.

Upon the breach, so far as it is to be applied to the first covenant, I think the plaintiff fails.

And to a great extent the same reasons appear to me to apply with respect to the second covenant. What act does the declaration charge that the testator had done, by means whereof the *lands* were or could be impeached, charged, affected, or encumbered in title, or estate, or otherwise. This breach must be sustained by some act antecedent to the entering into the covenant, so that it was broken *eo instanti* that it was made. The act, matter, or thing relied on is, that while the testator was a director and vice-president, and was, as is contended, a trustee for the bank, he "bargained for and obtained and procured a deed of bargain and sale, purporting to convey the land to him" from that institution. I have not yet satisfied myself that this is a statement sufficient to constitute a breach of that covenant. The plaintiff's ground is, that the testator, being a trustee, became a purchaser from his *cestui que trust*, and took a deed to himself. If the estate passed by the deed, how is the land impeached or encumbered in title or estate by this act? and if the deed was wholly void, the taking it would not affect the land in title or estate. The plaintiff complains of no eviction in fact, the result of the alleged defective title.

I think judgment should be given for the defendant.

HAGARTY, J.—The breach is substantially that the testator, being a trustee, purchased the property from his *cestui que trust*, the bank. It does not appear that he or the bank was or were trustees for sale. Such a purchase might be upheld or set aside at the suit of the *cestui que trust*, according to circumstances. (See Hill on Trustees, 537; and notes to Fox v. Macreth, 1 White and Tudor, L. C. 92.)

There is nothing to show any intervention or objection by or on behalf of the *cestui que trust*; but merely that in a suit duly instituted, without averring who were the parties thereto, the Court of Chancery held the plaintiff's title to be defective and bad, whereby the plaintiff was unable to enforce certain agreements between him and his sub-vendees.

From this I gather that the court declined (in the common phrase) to force the title on unwilling purchasers.

On the argument we are referred to the judgment of the court of equity in a suit instituted by this plaintiff against these defendants and others, in which he has obtained a decree for the rescission of the whole contract of sale, etc. (9 Grant, 430.) This of course does not appear on this record, and is only referred to as showing how the court of equity has decided for the final relief of this plaintiff.

It is not easy to understand how he can be entitled to annul the contract in one court, and to treat it as existing for the purposes of claiming damages in another.

After much consideration I have come to the conclusion that the plaintiff fails.

On the declaration as framed I am not prepared, sitting in a court of law, to hold the title bad merely because in equity it was not forced upon an unwilling purchaser. Without the averment of the proceedings in equity, I certainly could not consider the covenants broken merely because a trustee had bought from his *cestui que trust* under unexplained circumstances, no actual disturbance or eviction, or even a claim, being set up by the latter.

On this record the plaintiff continues in the apparently undisturbed enjoyment of the estate.

We have found no case in which damages were claimed in a court of law on the covenants here set out, in consequence of an alleged defect peculiarly cognizable by a court of equity, not resulting in disturbance or eviction.

Without entering into a wide discussion, it may be remarked that if a precedent has to be made, it ought not to be on a declaration framed as this is, throwing so little light as it does on the extent of the alleged damage, etc.

As far as we can judge, persons situated as this plaintiff asserts he is always resort for relief to a court of equity, which with all the facts disclosed, and all interests duly represented, can adjust the equities between the parties and do complete justice, just as the court seems to have done to this plaintiff in the case referred to, "returning him his purchase-money paid and interest, recouping him for his

outlay or expenditure for taxes and improvements, and interest on that expenditure, less the profits and moneys he may have derived from sale or otherwise, and his costs." We have no such powers.

If issue were joined on the averments that the testator had not good right to convey, etc., I apprehend our Nisi Prius Court would hold that the plaintiff must fail, as the legal estate had fully passed, etc., and that a court of equity could alone deal with the other questions raised, with other parties before.

If the plaintiff's contention be sound, the covenant would be equally broken before as after the decision of the court of equity, and we would be thus asked to decide that the mere facts stated of the relation of trustee and *cestui que trust* exhibit a want of right to convey, etc. This, I think, would be impossible.

The addition of the averment in the declaration that the plaintiff's sub-vendees declined to complete their purchases, would, I think, leave the matter in no better position. Nor, finally, do I consider that the statement that the court refused to make the vendees accept the title, and pronounced it defective, followed by no averment of disturbance or interference by the *cestui que trust*, the only party entitled to interpose, entitles the plaintiff to our judgment.

The facts alleged do not necessarily show that the title is defective. It may or may not be so, according to circumstances. I am not prepared to hold that the allegation of another court having pronounced it defective, in a proceeding not instituted by the only party entitled to object to the legal effect of the testator's title-deed, requires this court of law to hold the covenant broken.

I think defendants entitled to judgment.

MORRISON, J., concurred.

Judgment for defendants on demurrer.

BRIGHTLY *v.* RANKIN.

Promissory note—Indorsement by defendant before payee—Pleading.

Plaintiff declared upon a note as made by K. to M., and indorsed by M. to defendant, who indorsed to plaintiff. *Plea*, that defendant did not indorse to the plaintiff as alleged. The name of defendant appeared as indorser on the note *before* that of M.

Held, however, that on the pleadings this was immaterial, for M.'s indorsement to defendant was not denied, and his name appearing before defendant's could not affect the right of recovery.

APPEAL from the County Court of Huron and Bruce.

Declaration on a promissory note made by Moses King to Malcolm M'Cormick, indorsed by M'Cormick to defendant, who indorsed to the plaintiff.

Pleas—1. That defendant did not indorse to the plaintiff as alleged, and a second plea held bad on demurrer, and consequently not to be further considered.

At the trial the note proved to be made by King to M'Cormick or order, and on the back the first name appearing as indorser was that of defendant Rankin, and under his name that of the payee, M'Cormick, appeared.

It appeared that M'Cormick sold the note for value to the plaintiff before maturity with defendant's name on it as indorser, and the plaintiff's attorney got M'Cormick to put his name on it, which he did "without recourse."

The plaintiff had a verdict, with leave to defendant to move to enter a nonsuit on several grounds; that M'Cormick should have been first indorser; that defendant did not indorse to the plaintiff, as alleged.

In the following term a rule to enter a nonsuit on the leave reserved was made absolute, and the plaintiff appealed.

S. Richards, Q.C., for the appellant, cited *Peck v. Phippon*, 9 U. C. R. 73.

K. M'Kenzie, Q.C., contra, cited *West v. Bown*, 3 U. C. R. 290; *Booth v. Barclay*, 6 U. C. R. 215; *Gwinnell v. Herbert*, 5 A. & E. 436; *Lecan v. Kirkman*, 6 Jur. N. S. 17, 6 C. B. N. S. 929, Am. Ed.; *Matthews v. Bloxsome*, 10 L. T. Rep. N. S. 415; *Penny v. Innes*, 1 C. M. & R. 439.

HAGARTY, J., delivered the judgment of the court.

It appears to us that the appeal must be allowed, the only plea being substantially disproved.

Defendant merely traverses that he did not indorse the note to plaintiff. He did in fact indorse it in blank, and if it had afterwards passed through a dozen different hands their names could be all struck out, and his indorsement be properly averred to the plaintiff direct.

The only peculiarity in the case arises from the error in the payee, M'Cormick, writing his name after instead of before the defendant's name. If the payee's name had properly preceded that of defendant, there would on this issue be no pretence of defence.

We cannot, we think, on this issue hold that the note is not negotiable, or not put in circulation by the payee, because the latter has misplaced his name or placed it out of the usual order. His name was necessary to give the note currency.

What is really in issue on this traverse? The declaration says: "King made a note to M'Cormick or order. M'Cormick indorsed it to defendant, who indorsed it to plaintiff." Defendant does not deny M'Cormick's indorsement to him. If this be admitted, nothing appears left beyond the bare fact of defendant having indorsed it with the view of indorsing and making himself liable thereon. This is proved, and we hardly see how the appearance of M'Cormick's name, or any number of other names, below defendant's can affect the right of recovery on such a plea.

We think the payee's indorsement is not in issue on the record, and that therefore it is unnecessary to review the cases cited or to consider what the law might be on different issues. The case of *Young v. Glover* (3 Jur. N. S. 637, Q. B.) may be referred to as to an *indorsement* being written on the face of the bill instead of the back.

We allow the appeal, and direct the rule for nonsuit to be discharged.

Appeal allowed.

SPARLING v. SAVAGE.

Action for purchase-money of land—Receipt under seal—Estoppel—Account stated.

Plaintiff assigned to defendant his interest in a certain lease, by deed containing a receipt for the consideration-money, \$350. This deed was placed in K.'s hands to hold till defendant deposited this sum. K. delivered it to defendant on his promise that he would pay, and defendant afterwards paid him \$75, saying that he would hand him the balance as soon as he obtained it. On being asked again he said that he had the money, but that the plaintiff should pay part of the expense of a bond which he had had to give respecting the title. Plaintiff then sued upon the common counts for the purchase-money of land, and on an account stated.

Held, that he was estopped by the receipt under seal, and could not recover on either count.

Cocking v. Ward, 1 C. B. 858, distinguished, as to the account stated.

APPEAL from the County Court of Lambton.

Declaration on common counts, lands sold and conveyed by the plaintiff to defendant, accounts stated, etc.

Pleas—Never indebted, and payment.

Only one witness was examined at the trial. He produced an assignment under seal, made by plaintiff to defendant, in consideration of the sum of \$350 to him in hand paid by the defendant, the receipt whereof he, the plaintiff, did thereby acknowledge, whereby the plaintiff assigned to defendant all his right and interest in a certain lease made by one Scatcherd to four certain parties named, giving the date of the lease and its number of registration in the county registry, reciting that two of the original lessees had sold their interest to one Blinn and one Potter, the issuing of an execution from the Division Court against the two latter persons, and the plaintiff's purchase of their interest, being a chattel interest, at the bailiff's sale. There was a covenant against the assignee's acts, and for right to convey.

The witness stated that this assignment was left in his hands to hold till defendant deposited the amount of money mentioned in it; that defendant called on him and asked him for the paper to go to Sarnia to get the money for the sale of the lot; that as soon as he got the money he would pay it, and witness delivered the assignment to him on his promise that he would pay on his return. About a month after he paid witness \$75, and said he was willing to pay the

rest, but had not got it; that he had only half, and would pay the balance as soon as he got it. Again witness asked him for the money: he said he had got it, but he had had to give a bond to those to whom he sold to make the title good, and the plaintiff ought to pay part of the expense.

The appeal-book did not state whether defendant gave back the assignment to the plaintiff or the witness, or in whose custody it was at the trial.

It was objected for defendant that the instrument contained a receipt under seal, and that the plaintiff was estopped; and a verdict was taken for the plaintiff, with leave to move to enter a nonsuit.

In the following term a rule for nonsuit was, after argument, discharged, and defendant appealed.

S. Richards, Q.C., for the appellant, cited *Ketchum v. Smith*, 20 U. C. R. 313; *Baker v. Dewey*, 1 B. & C. 704; *Thomas v. Hawkes*, 8 M. & W. 140; *Lemere v. Elliott*, 6 H. & N. 656.

[*DRAPER, C.J.*, referred to *Canham v. Barry*, 15 C. B. 597.]

Robert A. Harrison, contra, cited *Cocking v. Ward*, 1 C. B. 858, 868; *Green v. Burtch*, 1 C. P. 313, 318.

HAGARTY, J., delivered the judgment of the court.

We feel some difficulty as to the plaintiff's right to recover. The whole consideration for any debt or acknowledgment of debt is the assignment of the leasehold interest. That is proved by the production of the deed; and there the consideration-money is expressly declared to be paid at or before its execution. The plaintiff had to rely on its provisions for one purpose and expressly to contradict them for another purpose. He says it is good to prove he sold the property to defendant for a named price, but seeks to avoid and contradict its express averment that such price has been paid. Ordinarily a deed cannot be so dealt with in a court of law. The point does not arise on any of the late powers given to parties who seek to displace a legal bar to recovery by setting up some matter which in equity shows that such bar should not be set up.

The plaintiff also contends that what passed between defendant and the witness amounts to an account stated. The witness held the deed not to be finally delivered till the purchase-money should be paid. He can hardly be said to be the plaintiff's agent for the purpose of stating or settling an account with defendant. He was able from defendant's admissions to prove that the purchase-money was in fact unpaid, and that defendant paid him a portion for the plaintiff, and promised to pay the rest. The learned judge below considered that until payment of the money the instrument would not operate as a deed. Such a view may suggest the difficulty that the sale of the interest was never complete, so as to entitle the plaintiff to sue for the price as an executed consideration. The plaintiff, it would seem, must assert that the consideration for the payment of the money was actually executed; he must recover for the price of lands sold, or on an account stated in respect thereof, or the price of lands sold.

What answer can be given in a law court, on an issue of payment or no payment for goods or lands, etc., to a receipt or acknowledgment under the plaintiff's hand and seal declaring that defendant had paid the price? No fraud is urged against the fact of the due execution. The plaintiff simply seeks by parol evidence to show that his own receipt is untrue.

The case of *Ketchum v. Smith*, in this court, in 1861 (20 U. C. R. 314), on an appeal from this County Court of Lambton, seems expressly in point, apart from any question as to a subsequent stating of an account. There the court held, in an action on common counts for land sold and conveyed, and payment pleaded, that the receipt for the purchase-money in the deed produced was conclusive evidence under the plea of payment, and that no estoppel need be pleaded; and in the absence of fraud in obtaining the seal of the plaintiff to the deed containing the receipt, the court reluctantly held the defence complete.

It remains only to consider if the subsequent evidence shows a valid accounting.

The well-known case of *Cocking v. Ward*, cited for the

defendant, does not, we think, apply. There was there a contract for the transfer of a leasehold interest in land by parol, and as such void by the Statute of Frauds; but possession was given and defendant placed in full enjoyment of that for which he bargained. Afterwards the defendant admitted he owed the consideration-money to the plaintiff, and promised to pay it. This the court held would support the account stated, the whole consideration being executed. *Tindal, C.J.*, says: "It must be taken that the debtor has satisfied himself of the justice of the demand; that it is a debt which he is morally, if not legally, bound to pay, and which therefore forms a good consideration for a new promise."

As we already intimated, we hardly see how anything that took place with the witness amounted to more than evidence to disprove the fact of payment evidenced by the deed. The defendant admitted he had not paid, and promised to pay; the deed said he had paid. If the plaintiff has sold a leasehold to him and put him in possession, etc., for a named price, though no writing existed, the subsequent admission and promise would make it like *Cocking v. Ward*. An account stated can be inquired into, as in *Thomas v. Hawkes* (8 M. & W. 140) *Alderson, B.*, says: "The issue is not simply whether there was an account stated or not, but whether the defendant was *indebted* on an account stated or not."

The nature of an account stated, and the recognition of the same principle, fully appear in the judgments of *Wightman* and *Blackburn, J.J.*, in a late case of *Laycock v. Pickles* (9 L. T. Rep. N. S. 378). See also *Lemere v. Elliot* (6 H. & N. 656).

If there were a good consideration for the account stated, there would also be a good one on the common counts. It all seems to revert to the single point, Was the money paid or not? We think we are compelled to hold in this court that the deed shows it was paid, and that the appeal must be allowed.

Appeal allowed.

HALL v. MOSS ET AL.

Special action—Securities given up by judgment debtor for collection—Duty of judgment creditor to collect—Negligence—Pleading.

The declaration set out that the plaintiff, being a judgment debtor of the defendants, admitted on his examination before a County Court judge that he had in his possession several promissory notes, which the judge, on the defendants' application, ordered him to deliver to the defendants, to be collected by them and applied upon the judgment; that afterwards the judge, on defendants' application, issued a summons to commit the plaintiff for not having done this, whereupon, on the demand of the now defendants, in obedience to the judge's direction, and to avoid committal, the plaintiff delivered such notes to the Clerk of the County Court for the use of the defendants, to be so collected and applied, and the surplus, if any, to be paid to the plaintiff. It was then alleged that it thereupon became the defendants' duty to use reasonable care and diligence in collecting these notes, but that they wholly neglected to do so, whereby several of the notes were barred by the Statute of Limitations, some of the parties became insolvent, and the plaintiff lost the amount thereof.

Held, on demurrer, that a good cause of action was shown, for the delivery to the clerk was under the circumstances a delivery to the defendants themselves, and the inference from the facts was that they undertook the duty charged. *Hagarty, J.*, dissenting, on the ground that there was no delivery to the defendants, and if they agreed to undertake the collection it should have been expressly so averred.

DECLARATION.—For that the defendants being judgment creditors, and the plaintiff a judgment debtor, under and by virtue of a certain judgment recovered in the County Court of the County of Perth by the now defendants against the now plaintiff, in a certain cause wherein the now defendants were plaintiffs and the now plaintiff was defendant, heretofore, to wit, on the 2nd of September 1859, on the application of the now defendants in the said cause to R. Burritt, Esquire, then judge of the said County Court, an order was made in the said cause by the said judge, whereby the said judge did order that the now plaintiff should attend before the clerk of the said County Court, at the courthouse in the town of Stratford, in the said County of Perth, on the second day after service thereof, at noon, and submit to be orally examined on oath as to any and what debts were owing or accruing due to him, and that on such examination he, the now plaintiff, should produce all books or documents in his possession or control relating to such debts, and that he, the now plaintiff, on the same occasion should be examined as aforesaid touching his estate and effects, and as to the property and means he had when the debt or liability was incurred for which the said judgment in the said cause had been obtained, and as to the property and means he still then had of discharging the said judgment, and as to the disposal he, the now plaintiff, might have made of any pro-

perty after the contracting of the said judgment debt; which said order having been duly served on the now plaintiff, he, the now plaintiff, in obedience thereto, afterwards, to wit, on the 23rd and 24th days of September in the year last aforesaid, personally appeared before the said clerk therein mentioned, according to the exigency of the said order, and was then and there orally examined on oath by the now defendants touching the matters in the said order expressed, and upon such examination the now plaintiff stated (as the fact was) that he had in his possession and control as his own property certain promissory notes and undertakings for the payment of money, of great value, to wit, of the value of \$2000, all then due, owing and unpaid—to wit, promissory notes and undertakings for the payment of money, made by the respective parties, and for the respective amounts, and of the respective dates hereinafter mentioned, that is to say, etc. (specifying the instruments.)

And afterwards, to wit, on the said 24th of September 1859, on the application of the now defendants, the said judge of the said County Court ordered and required the now plaintiff to deliver to the now defendants the said promissory notes and undertakings, to be collected by them, and the proceeds thereof to be applied upon and in payment of the said judgment; and the said judge, on the now defendants' application, then issued his summons in the said cause, whereby he required the now plaintiff to attend before him at his chambers in the courthouse, in the said town of Stratford, at ten o'clock in the forenoon on the second day after service thereof, to show cause why he, the now plaintiff, should not be committed to the common gaol of the said County of Perth (being the county in which the now plaintiff then resided) for a period not exceeding twelve months, on the grounds, amongst other grounds, that the now plaintiff had refused to deliver to the now defendants notes, due bills, and securities for money then in the now plaintiff's possession (meaning the said promissory notes and engagements herein above mentioned) towards satisfaction of the judgment debt in the said cause, whereupon the now plaintiff submitted; and on the demand of the now defendants, and in obedience to the directions of the said judge, and with his assent, and in order to avoid being committed to the common gaol of the said county in the said cause, the now plaintiff was forced and obliged and did then deliver to the clerk of the said County Court, for the use of the now defendants, the said several promissory notes and undertakings, to be collected by them, and the proceeds thereof to

be applied upon and towards the payment of the said judgment, and the surplus thereof, if any, to be paid or accounted for by the now defendants to the now plaintiff—whereof the now defendants then had notice.

And it thereupon became the duty of the now defendants to use due and reasonable care and diligence in and about the collecting, realizing, and getting in the said promissory notes and undertakings, and the amounts thereby secured, and applying, paying, and accounting for the same, as aforesaid.

Yet the now defendants, disregarding their duty in that behalf, did not use due and reasonable or any care and diligence in and about the collecting, realizing, and getting in the amount of the said promissory notes and undertakings, but wholly neglected so to do, by means whereof many of the said promissory notes and undertakings have become barred by the Statute of Limitations, and the amounts thereby payable wholly lost, and the several parties, makers and promisors of divers others of the said promissory notes and undertakings, have become insolvent and unable to pay the same, and the amounts thereof also thereby became wholly lost to the now plaintiff, and by means thereof the said judgment remains wholly unpaid and in full force against the now plaintiff. And the plaintiff claims \$1500.

Demurrer, on the grounds—

1. That nowhere in said declaration does it appear that the said defendants undertook to collect the said securities therein named.

2. That the facts stated in the said declaration, even if true, would not impose any duty in law upon the said defendants to collect said securities.

3. That it appears by the said declaration that the first order of the judge therein named was not complied with by the production of the said securities to the clerk of the said court in his examination, and that the subsequent orders mentioned in said declaration appear only to have been made for the purpose of enforcing obedience to the said order, or in law would have been and were null and void for any other purpose; and consequently, when the said judge directed the said plaintiff to deposit the said notes and securities with the said County Court clerk on the alleged demand of the said defendants, he complied with a demand which the said defendants were entitled by law to make to secure the complete examination of the said defendants and his means of paying the said judgment debt, and out of such a demand or

order no duty in law as alleged could arise and thereby be imposed upon the said defendants.

4. That it does not appear by the said declaration that the said defendants were ever instructed or authorized by the said plaintiff to institute any action at law or suits in equity for the enforcement of the collection of the said notes and securities in his name, or provided with the means of instituting or carrying on such actions or suits, nor does it allege that such duty was by law imposed upon or undertaken by the said defendants.

5. That although the said notes and securities, as appears by the said declaration, were handed to the clerk of the said court, who was bound by law to file them and retain possession of them until ordered by the said court or judge thereof to deliver them up, yet it does not appear that any such order was made directing him to deliver them up to the said defendants to procure such an order, or that such an order was procurable.

6. That the said County Court clerk does not appear to have been a person in the employ of the said defendants, or in any wise under their authority or control, and therefore was not bound to deliver the said securities to said defendants, nor is it shown that he was ready and willing to deliver the said notes and securities to the said defendants, or that they could have procured possession of them from him.

7. That it appears by the said declaration that the said plaintiff did not deliver the said notes and securities in pursuance of any contract or understanding between him and the said defendants, and the reasons alleged for the delivery thereof were insufficient in law to cause him to deliver the same into court, and consequently when doing so he did it of his own wrong.

Crooks, Q.C., for the demurrer, cited *Scott v. Shepherd*, 1 Sm. L. C. 5th ed. 413; *Carratt v. Morley*, 1 Q. B. 19; *Repton v. Hodgson*, 7 Q. B. 97.

M. O'Reilly, Q.C., contra, cited *Burnett v. Lynch*, 5 B. & C. 589; *Staines v. Morris*, 1 V. & B. 8.

DRAPER, C.J.—It appears by the declaration that the plaintiff was a judgment debtor of the defendants; that upon examination before the judge of the County Court he admitted that he had in his possession divers promissory notes and undertakings to pay money or its

equivalent in grain, etc., belonging to him, some negotiable, others choses in action; that the judge, on the defendants' application, made an order that plaintiff should deliver these securities to the defendants, to be collected by them and applied in satisfaction of the judgment; that afterwards the judge issued a summons calling on the plaintiff to show cause why he should not be committed, among other reasons, because he refused to deliver to the defendants the said notes, etc., towards satisfaction of the judgment debt, whereupon the plaintiff submitted, and on the demand of the defendants, and in obedience to the direction of the judge, and to avoid committal, he (plaintiff) delivered to the clerk of the County Court for the use of the defendants the promissory notes, etc., to be collected by them, and the proceeds applied in satisfaction of the judgment, and the surplus, if any, paid to the plaintiff, whereof the defendants had notice.

It is then stated that on these facts a duty arose that the defendants should use reasonable care and diligence in collecting these notes and undertakings, but that they wholly neglected so to do, and thereby many of them became barred by the Statute of Limitations, and the parties liable on others became insolvent, and the amounts thereof were lost to the plaintiff, and the defendants' judgment against him remains unsatisfied.

The declaration plainly avers that the notes, etc., particularly set forth, were by and through the application and procurement of the defendants lodged in the hands of the clerk of the County Court for the defendants' use, and to be collected by them, and the proceeds applied in satisfaction of the plaintiff's liability to the defendants.

It was no part of the clerk's official duty to accept the charge of these notes, for they were not exhibits or papers connected with a cause in court, unless the statement that the plaintiff in obedience to the direction of the judge delivered them to him makes them so. But I think the statement, taken altogether, means only that the judge on the defendants' demand ordered the delivery, thereby treating the clerk as the selected agent of the defendants. We are

not now bound to inquire whether the plaintiff was legally compellable to obey. It appears he did so, and, as appears to me, the delivery to the clerk was, under the circumstances, a delivery to the defendants themselves, in order that they might collect and properly apply the proceeds. If the delivery for this purpose had been made by direction of the judge directly to the defendants, I cannot doubt that it would have been their duty to use reasonable care and diligence to collect, and that if they neglected that duty, and thereby caused loss to the plaintiff, an action would lie.

The argument for the defendants is that the law imposed no such duty, and therefore unless the defendants undertook it for sufficient consideration they are not liable. I agree in this. But I think the inference upon this declaration is that the defendants did undertake, and then, in the language of *Littledale, J.*, in *Burnett v. Lynch* (5 B. & C. 609, 610), "Where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action." Here the facts are, that on the demand of the defendants, and in compliance with the direction of the judge, the plaintiff delivered to the clerk of the County Court the securities in question for the use of the defendants, and *to be collected by them*, and the proceeds to be applied as above stated. I think a promise is to be implied from these facts, and consequently that the duty alleged also arises as the declaration states. If in the case where goods are delivered to a party who is to do something about them *gratis*, the owner's merely trusting them with him is a sufficient consideration to make it his duty to take proper care or make proper use of them, *à fortiori*, where the delivery is made in order that the bailee may derive an advantage, though it inures also to the benefit of the bailor, it must create a sufficient consideration on which to found the duty or the implied promise.

I do not feel pressed by the statement that the judge made

an order for the delivery to the clerk, nor by the argument that such delivery being the consequence of the order, and made to avoid the apprehended penalty of non-compliance, could not be treated as a bailment to the defendant, for the plaintiff still retained a beneficial interest in the securities delivered, and their proceeds were applicable to his relief from the defendants' judgment; and if there was a surplus it was his, yet the order was made at the defendants' instance, and to procure payment to themselves, and the plaintiff is not prevented by the fact that he was under the influence of that order from treating the delivery as no waiver of his right to call on the defendants to account for the property with which he thus parted. Deprived of the possession and control of it by the means and procurement and for the use of the defendants, and that they might collect, for so the declaration states, it cannot, I think, be said with reason either that they were not bound to use reasonable diligence in collecting, or that he can have no redress if through their wholly neglecting to do so his securities have become of no value. I think the declaration shows they incurred the obligation, that they have committed a breach of it, and that the plaintiff has sustained damage thereby; and therefore that our judgment should be in his favour.

HAGARTY, J.—I am unable to bring myself to the conclusion that this declaration is sufficient.

In the absence of any express undertaking by the defendants, I do not see that a delivery to the clerk of the court, under the order of the judge, can be held to be a delivery to the defendants, giving them the control over these notes, as in an ordinary case. I cannot infer the breach of duty from these facts.

It is to be borne in mind that the notes in question were all liable to be taken in execution, and their collection would then devolve on the sheriff. It seems strange to me that securities so liable should become the subject of this special deposit and alleged arrangement.

When placed in the clerk's hands, would they be protected from any other execution in the sheriff's hands if the

property in them remained in these plaintiffs (the then execution debtors)? If the judge had no power to make such order it could not protect the property from execution, or enable the then execution plaintiff to collect them unmolested.

It may be, of course, that if they specially contracted to collect, etc., and apply the proceeds towards a reduction of these claims, and the surplus to the execution defendant, the liability of the goods to execution, etc., would not avoid the agreement. But I think such a contract, if made, should be specially stated and proved, and that it is not sufficient to state that the judge, at the defendants' instance, made an order, probably not warranted by authority, to deposit these securities with an officer of the court to be collected, etc., and then averring that in obedience to that order the now plaintiff did so deposit them, of which the defendants had notice.

I think in a novel action of this kind the plaintiff should not recover in the absence of an express contract.

MORRISON, J., concurred with the Chief Justice.

Judgment for the plaintiff on demurrer
Hagarty, J., dissenting.

AUSTIN v. FERGUSON.

Covenant for title—Construction—Whether qualified or general.

Defendant conveyed his equity of redemption in certain land to the plaintiff, subject to two mortgages, one made by himself, the other by a stranger, covenanting that notwithstanding anything done by him he was entitled to such equity and had good right to grant the same to the plaintiff, that the said lands were not subject to any encumbrance but the mortgages mentioned, and that he had done or suffered nothing whereby such equity could be affected; and further, that the said plaintiff might quietly enjoy the land after the 1st of November next without interruption from the defendant or any other person, and that free from all arrears of taxes, and from all former conveyances, mortgages (except the mortgages referred to), judgments, *especially any and all undischarged judgments registered against the lands of the defendant*, and of and from all manner of other charges and encumbrances whatsoever.

Held, that the last covenant was not restricted to judgments against the defendant, but extended to judgments against his grantor.

APPEAL from the County Court of York and Peel.

Action on covenants for title, the question being whether certain covenants in the deed sued on were general or limited.

The declaration alleged that defendant by deed granted to the plaintiff a certain lot of land, subject to a mortgage to one Alexander, and thereby covenanted with the plaintiff that the said land was not in any way charged with or subject to any sum or sums of money or other payments or encumbrances whatsoever, other than the said mortgage to the said Alexander; and that it should be lawful for the said plaintiff, his heirs and assigns, peaceably and quietly to enter into, have, hold, and enjoy the said land and premises thereby conveyed, with the appurtenances, from the first day of November then following, without the let, hindrance, or denial of him, the defendant, his heirs or assigns, or any other person or persons whomsoever; and that free and clear, and freely and clearly acquitted, exonerated, and discharged of and from all arrears of taxes whatsoever, and of and from all former conveyances and mortgages (except the mortgage hereinbefore referred to), debts, judgments, executions, and recognizances, and of and from all manner of other charges and encumbrances whatsoever.

The breach alleged was that plaintiff was not permitted nor able quietly to enjoy without the hindrance, etc., of other persons, but that at the time of making the deed the land was subject to two judgments (specified), registered against one Brawley, who at the time of the registration was owner of the land, and conveyed to defendant; which judgments the plaintiff had to pay in order to save the land.

At the trial the deed in question was produced, dated the 18th of April 1853, by which defendant conveyed to the plaintiff. It recited an outstanding mortgage, made by defendant to the plaintiff and his partner in business, on which £440 and interest remained unpaid; and that another mortgage, made by one Brawley to one Alexander, was also outstanding for securing £171 and interest; and that the plaintiff had agreed with defendant for the purchase of the inheritance and equity of redemption in the land, subject to the Brawley mortgage for £750. Then came the usual granting words, and *habendum* in fee, subject to the Brawley mortgage.

Defendant then covenanted with the plaintiff as follows:—

That for and notwithstanding any act, deed, matter, or thing whatsoever by him, the said T. R. F., made, done, committed, or executed to the contrary, he, the said T. R. F., at the sealing and delivery of these presents, is lawfully and justly entitled to the equitable inheritance and right of redemption of the said lands, tenements, hereditaments, and premises, and all and singular other the premises hereby granted or intended so to be; and that he now hath in himself good right, full power, and lawful and absolute authority to grant the same to the said J. A., his heirs and assigns for ever, in manner aforesaid, according to the true intent and meaning of these presents; and also that the said lands, tenements, hereditaments, and premises are not in anywise charged or chargeable with, or subject to, any sum or sums of money, or other payments or encumbrance whatsoever, other than the said sum of £171 and the sum of £440, secured as aforesaid by the indenture hereinbefore mentioned, with interest; and that he, the said T. R. F., hath not heretofore done, or willingly suffered to be done, any act, matter, or thing wherewith or whereby the equity of redemption of the said lands, tenements, hereditaments, and premises, hereby granted or intended so to be, are or can, or may be released, discharged, granted, conveyed, or in anywise encumbered; and also that it shall and may be lawful to and for the said J. A., his heirs and assigns, peaceably and quietly to enter into, have, hold, use, occupy, possess, and enjoy the aforesaid lands, tenements, hereditaments, and premises hereby conveyed, or intended so to be, with the appurtenances, from and after the first day of November next, without the let, hindrance, interruption, or denial of him, the said T. R. F., his heirs and assigns, or any other person or persons whomsoever; and that free and clear, and freely and clearly acquitted, exonerated, and discharged of and from all arrears of taxes and assessments whatsoever due or payable upon or in respect of the said lands, tenements, hereditaments, and premises, or any part thereof, and of and from all former conveyances, mortgages, except the mortgages hereinbefore referred to, rights, annuities, debts, judgments, *especially any and all undischarged judgments now registered against the lands and tenements of the said T. R. F. in the registry office in the County of Simcoe*, executions and recognizances, and of and from all manner of other charges and encumbrances whatsoever; and also that the said T. R. F., his heirs and assigns, and all and every other person or persons whomsoever having

or lawfully claiming, or who shall or may have or lawfully claim any estate, right, title, interest, or trust, of, in, to, or out of the lands, tenements, hereditaments, and premises hereby conveyed as aforesaid, or intended so to be, with their appurtenances, or any part thereof, by, from, or under, or in trust for him, the said T. R. F., his heirs and assigns, shall and will, etc. Here followed the usual covenant for further assurance; and the deed concluded with a release of dower.

At the trial a verdict was taken by consent for the plaintiff, with leave to defendant to move to enter a verdict for him. A rule having been obtained accordingly, the learned judge below decided against defendant's liability for these judgments; and the plaintiff appealed.

Roaf, Q.C., and *M. R. Vankoughnet*, for the appellant, cited *Norman v. Foster*, 1 Mod. 101; *Young v. Raincock*, 7 C. B. 310; *Browning v. Wright*, 2 B. & P. 13; *Howell v. Richards*, 11 East, 633; *Stannard v. Forbes*, 6 A. & E. 572; *Foord v. Wilson*, 8 Taunt. 543; *Hesse v. Stevenson*, 3 B. & P. 565; *Smith v. Compton*, 3 B. & Ad. 189; *Gainsford v. Griffith*, 1 Saund. 58; *Nind v. Marshall*, 1 B. & B. 318; *Summer v. Williams*, 8 Mass. 162; *Dickinson v. Hoomes*, 8 Grattan, 353; *Rawle on Covenants*, 499.

Ferguson, contra.

HAGARTY, J., delivered the judgment of the court.

We agree with the learned judge as to the great difficulty in eliciting any clear rule of construction of general application from the great number of cases and opinions of text writers.

It is not necessary to examine the authorities individually. As *Lord Denman* says in *Stannard v. Forbes* (6 A. & E. 587), "The court has no other duty to discharge than that of correctly construing the language employed. In performing this task on any particular occasion we are not likely to derive much assistance from the former decisions that may be cited, as every instrument varies in some respect from all others, and must be interpreted according to its own language;" and as *Dallas, C.J.*, says in *Nind v. Marshall* (1 B. & B.

345), "It is a question of intention, to be collected not merely from the words of any one covenant, but by comparing all the covenants each with the other, so that the construction be made on the entire deed; and this without reference to the order in which the covenants are found." And to the same effect is the note of the learned editor to *Gainsford v. Griffith*, 1 Wms. Saund. 60 l.

The deed may be thus fairly stated: Defendant professes to sell an equity of redemption, subject to the Brawley mortgage and to his own. He says: "I covenant that notwithstanding anything I have done, I am lawfully entitled to that equitable estate, and have good right to convey it to you, and the land is only chargeable with those two mortgages; and I have done nothing to encumber that equity; and you may quietly possess it after the 1st of November next, without hindrance from me or any other persons whomsoever, and that free from all taxes, and all conveyances and mortgages, except those mentioned, and all debts and judgments, especially all judgments outstanding against me, and free of all other encumbrances whatever; and I and all claiming under me will make you any further assurance you please."

I should not feel much difficulty in the case down to the words as to quiet enjoyment against the grantor and all other persons whatever. I should, I think, hold that those last general words were controlled by the preceding restriction as to the grantor's own acts.

The difficulty is created by the peculiar wording as to the judgments, which happen to be the very encumbrance complained of. The introduction of the sentence, "especially all judgments against the grantor," raises great difficulty.

What was the grantor's meaning? "You shall hold discharged of all judgments, especially judgments against me, and all other charges whatsoever." Can we reject this altogether, and hold that he only meant judgments against himself?

If we import the original words of restriction into the covenant, then it will be, "notwithstanding any act done

by me, you shall hold clear of all judgments, especially judgments against me, and of all other charges whatsoever." The allusion or reference to judgments against himself would be wholly unmeaning.

It may also be doubted whether the preliminary restricting words cease to be applicable to the series of covenants after the express covenant that the grantor has done no act to encumber. It would be insensible to say that for and notwithstanding his own acts he had done no act.

The cases requiring notice would seem to be *Howell v. Richards* (11 East, 633), *Nind v. Marshall* (1 B. & B. 319), and the comments on them.

Lord St. Leonards (V. & P. 14th ed. 1862, p. 606), speaking of *Howell v. Richards*, says: "Where the covenants were introduced with the usual words restricting them to the covenantor's own acts, but the covenant for quiet enjoyment ended thus, 'of or by the said grantors or any of them,' etc., 'or of or by any other person or persons whatsoever,' and the covenant against encumbrance was general, excepting only a chief-rent, it was determined that the covenant for quiet enjoyment was not restrained by the introductory words of restriction, but was general and unlimited; for the covenant was a distinct covenant from the covenant for title, and a man may not choose to guarantee his title generally, and yet may readily undertake that the possession should not be disturbed." *Lord Ellenborough's* judgment in that case seems very fully considered.

Commenting on *Nind v. Marshall* (1 B. & B. 319), he says: "It was held by three judges against one that the covenant for quiet enjoyment was restrained to persons claiming under the seller; and the case was distinguished from *Howell v. Richards*, on the ground that there the covenant respecting encumbrance contained words as general as the words of the preceding covenant for quiet enjoyment, with one single exception, viz. the chief-rent, which was not an act or default of the party, or of any claiming under him. This exception, therefore, confirmed the generality of all the other words."

In *Platt on Covenants*, 364, it is said: "In order to

admit of the qualifying language of the one covenant being considered as virtually transferred to and included in the other, it appears that they should be connected covenants, of the same import and effect, and directed to one and the same object. . . . The averment for title and for right to convey are (what is somewhat improperly called) synonymous covenants; but the covenant for quiet enjoyment is of a materially different import, and directed to a different object." Referring to *Lord Ellenborough's* judgment in *Howell v. Richards*, he proceeds: "Partly on the circumstance of the exception of a chief-rent to the lord of the fee, but principally for the above reasons, was *Howell v. Richards* determined." He then comments on *Nind v. Marshall*, and points out the difference between them in the clause respecting encumbrances, which he says "forms the strength of the argument in favour of the latter defendant, and formed the strength of the argument against him in the former case;" pointing out the exceptions as to the chief-rent "as confirming the generality of all the other words."

Mr. Rawle, commenting on the judgment of *Park*, the dissenting judge in *Nind v. Marshall*, says: "Indeed, the distinction taken by that learned judge (which *Lord St. Leonards* has observed to be a very just one) between the different natures of the covenants seems not to have been observed in *Nind v. Marshall*" (*Rawle on Covenants for Title*, 3rd ed. p. 506).

In the case before us the plaintiff does not rely merely on the general words in the covenant for quiet enjoyment. If that were all, the argument would be strong to bring it within *Nind v. Marshall*. But he points to the succeeding words, in substance that the grantee should enjoy free of all judgments, especially judgments against the grantor himself.

If the words were, that he should hold free of all judgments excepting one particular specified judgment against some third person, it would be hard to distinguish the case from the exception of the chief-rent to the lord in *Howell v. Richards*.

We fear that the words before us are at least not more

favourable to the defendant. He guarantees quiet enjoyment against all mortgages except two, one of which was not created by his act, but by a previous owner, and need not have been excepted if the covenant extended merely to his own acts, as in the case of the chief-rent. There is also to be no interruption from judgments, especially judgments against himself.

With every disposition to construe the deed in all its parts as liberally as possible, and to give defendant the benefit of all the well-settled rules of construction, we think we are bound by authority to hold that his covenant extends to the judgments assigned or set forth in the breach; and that the appeal must be allowed, and the rule below to enter a verdict for defendant be discharged.

Appeal allowed.

CONGER v. PLATT.

Dower—Partnership property.

Dower—Plea, on equitable grounds, that the land was part of the partnership property and stock-in-trade of the husband and S. trading together as merchants, and was purchased by them as such partners, and paid for out of their partnership moneys, and used in the said partnership business, and that the husband was never seised thereof otherwise than as such partner.

Held, on demurrer, that the plea sufficiently showed the land to have been purchased for partnership purposes; and that it formed a good defence.

DOWER.—The demandant claimed as the widow of Wilson Seymour Conger, deceased.

Plea, on equitable grounds—That the said demandant is not entitled to the said third part of the said land and premises in the said plaint described, as the dower of the endowment of the said Wilson Seymour Conger, deceased, inasmuch as the said lands and premises were part of the partnership property and stock-in-trade of the said Wilson Seymour Conger and one Thomas Scott, then trading together as general merchants in the town of Cobourg, and were purchased by the said Conger and Scott as such partners and paid for out of their partnership moneys and used in their said partnership business, and the said Wilson Seymour

Conger was never seised of the said lands otherwise than as such partner of the said Thomas Scott.

Demurrer, and joinder.

C. S. Patterson, for the demurrer.

Hector Cameron, contra, cited *Wylie v. Wylie*, 4 Grant, 278; *Heney v. Low*, 9 Grant, 265; *Sanborn v. Sanborn*, 11 Grant, 359; *Baxter v. Brown*, 7 M. & G. 199; *Bright on Husband and Wife*, 331.

DRAPER, C.J., delivered the judgment of the court.

The question raised is whether this land was not the property of the firm, that is, of the demandant's husband and S. as partners. The plea appears to us to aver this most distinctly. It cannot be deduced from the statements in the plea that the two partners were merely co-owners of the land, forming no part of the assets of the firm; and the matter chiefly pressed on us is, that it is not directly asserted that the land, besides being purchased by the partners as such and being paid for out of partnership funds, was purchased for partnership purposes. But there is the additional statement that it was used for partnership purposes, and that the husband was never otherwise seised of it than as partner of S., and the averment with which the plea begins, that the land was part of the partnership property and stock-in-trade. This appears to us to bring the case within the decision in *Darby v. Darby* (3 Drewry, 506, 2 Jur. N. S. 271), in which it is held that whenever partners purchase real estates for the purpose of the partnership, so as to make them partnership property, they are converted into personalty, not merely as between the partners *inter se*, but as between the real and the personal representative of the deceased partner.

We think our judgment should be in the defendant's favour on this demurrer.

Judgment for defendant on demurrer.

MARTIN v. M'CHARLES.

Practice—Service of writ—Affidavit of service—Defects in Jurat—Moving to set aside judge's order.

A jurat to an affidavit "Sworn before at," etc., omitting the word *me*, *Held*, sufficient—for all might be read as one continuous sentence, when it would mean that it was sworn before the commissioner signing.

An affidavit of service of a writ of summons in ejectment need not state that the copy served was indorsed with the name and residence of the attorney, nor that such indorsement was made on the writ within three days, nor that the service was effected upon the person or tenant in possession.

Where such writ is tendered to defendant, and placed within his reach, and its character explained, *Semble*, that this is a personal service, though he refuses to take it up.

Where proceedings are set aside in Chambers on defendant's application *on payment of costs*, the court will not interfere merely as regards costs except in a very strong case; and defendant having taken out the order cannot be heard to set it aside.

ON the 5th of February *Mr. Justice Morrison* made an order, founded on a summons granted on the 20th of November last, on the application of the defendant, setting aside the judgment signed by the plaintiff in this cause and all subsequent proceedings; but to this, for which defendant asked, the learned judge on considering the matters brought before him added this condition, that the defendant should pay to the plaintiff the costs of entering the judgment and of that application, which he fixed at the sum of \$5, and also the sheriff's fees upon the execution of the *hab. fac. pos.*

J. A. Boyd moved for a rule to show cause why this order should not be set aside, and why the judgment and execution in this cause and subsequent proceedings should not be set aside with costs, and a writ of restitution issue in favour of defendant, on the grounds—

1. That the affidavit of service of the writ herein is defective in the jurat in omitting the word "me" therein.

2. That such affidavit is defective, in not stating that the copy of the writ served was indorsed with the name and place of residence of the attorney suing out the same, and that an indorsement of the day of the week and month of the service of said writ was made on the said writ within three days after such service.

3. That said affidavit is defective, in not stating that the

service of such writ was effected upon the person or tenant in possession of the premises in question.

4. That there was no service of said writ upon the said defendant at all, and no notice thereof given to him before judgment signed; and there is no indorsement of the day of the week and month of the service of said writ thereupon.

5. That at all events there was no *personal* service of said writ within the meaning of the 92nd rule of court, so as to dispense with the necessity of a judge's order authorizing judgment to be signed herein.

Doe Jackson *v.* Roe, 4 Dowl. 609; Hall *v.* Yuill, 2 P. R. 242; 1 Chitty Rep. 118, note *a*; Thompson *v.* Slade, 25 L. J. Ex. 307; Lush Prac., 3rd ed. p. 864, 867, were cited in support of the application.

DRAPER, C.J., delivered the judgment of the court.

As to the latter part of this application, the defendant's own affidavit shows it to be wholly unnecessary, since it appears he is in possession, and has been constantly resident on the premises since the 16th of October last, while an affidavit on the plaintiff's part shows that immediately after the execution of the writ of *hab. fac. pos.* the defendant re-entered forcibly.

Under the existing order, therefore, both judgment and writ of execution are set aside, and the whole complaint is that the defendant has to pay \$5.

As to this, it is urged that there were irregularities in the plaintiff's proceedings which entitled the defendant to have had the order made in his favour with costs, or at least without making him pay them.

The first objection is that the jurat to the affidavit of service is as follows: "Sworn before at the," etc., concluding in the usual form, and signed by the commissioner. The want of the word "me" is objected. We think that we may read the whole jurat as one continuous sentence, when its sense and meaning is that the affidavit was sworn before the commissioner who subscribes the jurat. The second objection is not sustained by the books of practice. Nor is the third, so far as the action of ejectment is concerned. The

fourth, which I incline to think a defect, is, I think, cured at this stage.

It appears sufficiently that the service was made *on the defendant on the premises*, and he seeks now an order to allow him to defend as tenant in possession. It is not, however, stated in all the books of practice that it need be so stated in the affidavit of service, nor am I aware of any case so deciding, though I should recommend its being done.

As to the fourth and fifth objections, I think there was a service on the defendant personally. A man cannot be forced to accept a paper which is tendered to him, nor to pick it up when laid at his feet; but if it is tendered to him, its nature or character explained, and placed immediately before him within his reach, and he will not take it, we are not prepared to say it is not a personal service, though the plaintiff would have saved himself trouble by getting a judge's order.*

We have gone through the objections on which the defendant relies, and think they are not sufficient to call for our interference. But we are strongly adverse to entertain an application of this character merely for the purpose of changing an order as to costs. It must be a very strong case which would justify our giving a rule *nisi* on this ground; and, lastly, the defendant cannot be heard to set aside an order taken out by himself.

Rule refused.

* The affidavit of service, made by a son of the plaintiff, stated that he went to defendant upon the lot in question, of which he was then in possession, and handed him a copy of the writ; but as he refused to take it, deponent laid it down on the ground in front of and not over a yard from him, and at the same time told him it was a writ of ejectment; that deponent left it there, as defendant refused to take it, and he could not say whether defendant picked it up or not.

KERR, ADMINISTRATOR OF JANE CHAPMAN *v.* BOULTON ET AL., EXECUTORS OF BOULTON.

Action against surety on bond—Plea, time given to principal—Necessity for production of bond—New trial refused.

To an action on a bond the plea was the discharge of the defendant as surety by time given to the principal debtor. *Held*, that it was necessary for defendant to prove the bond, in order to identify it with the arrangement mentioned in the plea.

The defendant having given no notice to produce, was precluded from giving secondary evidence of the bond, and the plaintiff had a verdict. Considering the nature of the defence set up, the court refused to interfere upon an affidavit by one of the defendants that he was informed and believed the plea could be proved.

DECLARATION on a bond by the testatrix Boulton to the intestate Chapman, in £300, conditioned that if one D'Arcy E. Boulton paid to the intestate a certain sum of money which he then by his bond became bound to pay to the intestate, that is to say, £150, with interest annually, the principal sum on or before the 11th of December 1850, and the interest on the 11th December in each year after 1848, then the bond should be void. *Breach*, that D. E. Boulton has not paid the same, nor did the testatrix, nor have the defendants.

The defendants Cameron and Cayley, on equitable grounds, pleaded that the testatrix made the bond as surety for D. E. Boulton; and after the time for the payment of the principal money had elapsed, and before this suit, the intestate in his lifetime, and in the lifetime of the testatrix, in consideration of 12 per cent. interest to be paid to her by D. E. Boulton, agreed with him to give time to him for payment of the £150 for one year; and the intestate, without the consent or knowledge of the testatrix, did in pursuance of such agreement forbear and give time for such payment for one year after the 11th of December 1850, by reason whereof the said testatrix in her lifetime, and the defendants as executors since her death, were discharged.

Similar plea by the defendant William Henry Boulton.

Issue on both pleas.

The trial took place at Cobourg, before *Draper, C.J.*, in October 1865.

The defendants began, and on their first witness, the principal debtor, being called, he was proceeding to speak of the intestate and of his dealings with her in this matter, when the bond was asked for by the plaintiff's counsel. It then was stated, and not denied, that there had been no notice given to produce. The objection seemed to be considered fatal, as the bond was not forthcoming, the plaintiff's attorney having been put by the defendants' counsel into the witness-box, and swearing he had not got the bond in court, and this witness was called upon the suggestion that if the bond was in court notice to produce would be unnecessary.

The evidence for the defence was not pressed, nor was it insisted that the production of the testatrix's bond was unnecessary to enable the defendant to give evidence, and the plaintiff was allowed, as if inevitably, to take a verdict.

In Michaelmas term *M^cMichael* obtained a rule to show cause why there should not be a new trial, on the ground that the verdict was contrary to law and evidence, and for misdirection and improper rejection of evidence, in refusing to allow the defendants to prove that, as pleaded, time had been given to the principal without producing the bond; or on the merits, on an affidavit of one of the defendants, that, as he was informed and believed, the facts pleaded were true; that evidence was prepared and ready to be given to prove them, but, as he understood, from the misconception of counsel it was not offered; that the defendants had a good defence on the merits, by the giving of time to the principal debtor, as he was informed and believed.

Spencer showed cause in this term. He filed affidavits—one from a person who said the intestate lived for the last eight years of her life with him, during all which time she did no business; that from the date of the bond to the death of the intestate the bond was always in deponent's custody, and he collected and received all the money that was ever paid on the bond, and did all the business that was done in respect of it, and that to the best of his knowledge and

belief the intestate never received any money, or did any business, or made any agreement, or entered into any negotiation in respect thereof; and that she could not have done so without his knowledge.

The plaintiff's attorney swore that the defence was opened and a witness called, and questions were put to him respecting the bond sued upon, whereupon the plaintiff's counsel objected to secondary evidence of the contents of the bond being given, whereupon the defendants' counsel called the plaintiff's attorney, and as he had not the bond in court the defendants' counsel "abandoned his defence without asking or offering to give any further evidence." He cited *Bank of Montreal v. Snyder*, 18 U. C. R. 492; *Atkins v. Owen*, 2 A. & E. 35; *Lawrence v. Clark*, 14 M. & W. 250; *Shearm v. Burnard*, 10 A. & E. 593; *Read v. Gamble*, ib. 597, note; *Ward v. Suffield*, 5 Bing. N. C. 381; *Whitehouse v. Hemmant*, 3 H. & N. 965, Am. Ed.

DRAPER, C.J., delivered the judgment of the court.

When the objection was taken at the trial by the plaintiff's counsel, that the defendant must produce the bond in evidence in order to prove any arrangement such as the pleas set forth, I must say my impression at the moment would have led me to sustain it, or at least to have only allowed the cause to proceed subject to the objection. But no argument was urged on the defence, and the plaintiff's attorney was put into the witness-box, apparently with the hope of eliciting from him that he had the bond in court; and on hearing him say he had not, the defendants' counsel, without calling on me for any ruling, sat down, and I then directed a verdict for the plaintiff. From my impression at the moment, I think it very probable the defendants' counsel might have inferred that I was favourable to the objection, and I have no doubt whatever that he did so, but I am convinced that I did not formally reject the evidence for the defence, or formally uphold the objection taken on behalf of the plaintiff, for if I had done so it would have appeared on my notes. My invariable practice in such matters leaves me in no doubt on this point. If I ought not under the

circumstances to have directed a verdict for the plaintiff, I certainly did so, and so far misdirected the jury.

But on the real point I adhere to my impression at the trial. By the nature of the pleas the plaintiff was relieved from the necessity of producing the bond declared upon in support of his case, but it by no means is a necessary consequence that the defendants need not produce it to sustain their defence.

The admission, by not pleading in denial, was that the defendants' testatrix had made the bond, or a bond such as was set out in the declaration; but the defence required to be connected with that very bond, and to establish as a matter of fact (the whole plea being in issue) that the circumstances relied upon to discharge the testatrix occurred in respect to that very bond. It became therefore a question of identity between the bond declared on and the bond referred to in the plea, and to establish this identity production of the instrument, or notice to produce, in order to let in secondary evidence, was necessary. *Atkins v. Owen* (2 A. & E. 35) appears to me to establish this.

In *Goodered v. Armour* (3 Q. B. 956) the plaintiff declared on a bill of exchange, and the plea in substance was that the bill was given under circumstances which according to the bankrupt law made it void, on which an issue was raised. At the trial it was proposed to prove a state of facts relative to a bill, such as were pleaded, and to identify by the evidence the bill to which these facts related with the bill declared upon. It was objected that to let in this evidence the bill must be produced, and the judge at Nisi Prius sustained the objection. Most of the cases on the subject are referred to in the argument on a rule for a new trial. The court discharged the rule. It was a recollection of the decision in *Read v. Gamble* (10 A. & E. 597, note) that created in my mind the impression I have stated. *Lawrence v. Clark* (14 M. & W. 250) is directly upon the same point, and was acted upon in this court in the *Bank of Montreal v. Snyder* (18 U. C. R. 492).

Considering the nature of the defence desired to be set up in this case, we should not be warranted in granting a new

trial unless the application was sustained by very strong affidavits. But there is but one, and that is only founded on information and belief that the plea can be proved. On the legal objection the case wholly fails, and on the affidavit it is not sufficiently supported, even if there had been no affidavit on the other side.

Rule discharged.

THE QUEEN *v.* THE COURT OF REVISION OF THE TOWN OF
CORNWALL.

*Assessment—Court of Revision—Six days' notice of appeal to—Waiver—
C. S. U. C. ch. 55, sec. 60—Mandamus.*

An elector served the clerk of the municipality with notice that several persons had been wrongfully inserted on the assessment roll, and others omitted, or assessed too high or too low, and requesting the clerk to notify them and the assessor when the matters would be tried by the Court of Revision. On the 22nd of May the Court met, when it was objected for the parties named that six days' notice had not been given, but only five. The court then adjourned until the 30th, directing proper notice to be given, which the clerk omitted to do, and in consequence they refused on the 30th to hear the appeal, and finally passed the roll. On application for a *mandamus* to compel them to hear and determine the matters,

Held, that they were right, the six days' notice being imperatively required by the Act; and that the appearance of the parties by their counsel to object to the want of such notice was not a waiver of it.

Semble, that, if this were otherwise, the proper course would have been a *mandamus* to the mayor to summon the Court of Revision, under sec. 55 of the Assessment Act.

IN Trinity term last *M. C. Cameron, Q.C.*, obtained a rule for a *mandamus nisi*, directed to the Court of Revision for the municipality of the town of Cornwall, commanding that court to hear and determine the complaint of Wm. Cox Allan, an elector and councillor of the town of Cornwall, against the assessment and non-assessment of the persons mentioned in certain notices served by the relator on the clerk of the municipality on the 13th of May last, and filed on this application.

The affidavit of the relator set out that he was an elector, etc.; that on the 13th of May last he served the clerk of the municipality of the town of Cornwall with four notices in writing, signed by himself, copies of which were attached to the affidavit filed.

The first notice complained that 77 persons named therein were wrongfully inserted in the assessment roll for the year 1865, and it requested the clerk to notify the parties and the assessor of the time when the matters would be tried by the Court of Revision. The second notice complained that 37 persons therein named had been omitted from the roll. The third notice complained that 21 persons therein named had been assessed too low; and the fourth notice complained that 13 persons named therein were assessed too high. The three last also requested the clerk to notify the parties, as stated above in the first notice.

On the 22nd of May the Court of Revision, consisting of John S. M'Dougall, Donald M'Millan, John Hunter, Andrew Hodge, and John M'Donald, met at the Town Hall, the relator being present and prepared to prove the truth of the matters of appeal notified by him to the clerk; that Messrs. John B. M'Lennan and Jacob F. Pringle, Barristers, appeared on behalf of the persons mentioned in the notices of appeal, and objected that as the parties had not six days' notice before the 22nd of May the court had not then jurisdiction to hear the appeal. And the relator's affidavit stated as a fact that the notices were only given five days before the 22nd of May; that the assessor was present and made no objection; that the Court of Revision refused to hear the appeal on the ground taken by the counsel for the parties; that when the court adjourned on that day the chairman announced that new notices should be given to the parties and the assessor, and that there was time enough to give such new notices for the 30th of the same month, when the appeals should be heard on that day; that on the 30th the court met; that the relator was present, and was ready to proceed, but that the clerk announced to the court as a fact that he had not given the new notices, and the court refused to hear the appeals, and directed the clerk to indorse upon the assessment roll a certificate that the roll had been finally revised, which the clerk did.

Mr. Bethune, the relator's solicitor, made an affidavit corroborating the relator's affidavit, and setting out that the five persons named above constituted the Court of Revision.

During last Michaelmas term the Court of Revision made a return to the writ as follows:—

In the Queen's Bench.

The return of the Court of Revision of the corporation of the town of Cornwall to the annexed writ of *mandamus nisi*.

"We, the said Court of Revision, do make the following return to the said writ:—

"We cannot, as we are by the said writ commanded, try and determine whether James P. Whitney," etc. etc., "or any of them, have or has been wrongfully placed upon or inserted in the said assessment roll, or whether the said William Fountain," etc. etc., "or any of them, have or has been wrongfully omitted from such roll; or whether the said James M'Donald (Athol)," etc. etc., "or any of them, have or has been assessed at too high a sum upon such roll; or whether Oliver King," etc. etc., "or any of them, have or has been assessed at too low a sum; nor confirm and amend the said assessment roll; because the said complaints in the said writ mentioned have never been submitted to us in manner and form as is required by the Consolidated Statutes of this province respecting the assessment of property in Upper Canada, and chaptered 55, it appearing to us at our meetings held on the 22nd and 30th days of May last, for the purpose of trying all complaints against or appeals from the said assessment roll, and of finally revising the same, that no notices or no sufficient notices had been served on James P. Whitney and the other persons aforesaid, as required by the said statute, and that we therefore decided that by reason of the insufficiency of the said notices we had no power or jurisdiction to try and determine the said complaints, and because the said complaints against or appeals from the said assessment roll having failed on account of the want of proper notice, and no other complaints against the said assessment roll or appeals therefrom having been submitted to us, and the time allowed us by the said statute for revising the said assessment having then elapsed, the said assessment roll was on the 30th day of May aforesaid finally revised by us and certified by the clerk of the corporation of the said town of Cornwall, as required by the said statute. And because the judge of the County Court of the United Counties of Stormont, Dundas, and Glengarry, on the said complaints in the said writ mentioned being duly submitted to him by way of appeal from our said decision in respect to the said appeals, after having heard counsel upon and duly considered the

said appeal, decided that owing to the insufficiency of the said notices he had no power to reverse our said decision. We further return, as we believe the fact to be, that the proceedings taken by us in respect to the said assessment roll were regular and in accordance with the requirements of the said statute, and we could not have taken any other course or decided differently than as aforesaid in respect to the said complaints against or appeals from the said assessment roll without contravening and disregarding the said statute, as we were and still are of opinion that the wording of the said statute is imperative. And we have now no power, and we humbly submit that we should not be compelled by the peremptory order of this honourable court, to try and determine the said complaints, or again to revise the said assessment roll.

“ All which we humbly submit as our reason and excuse for not trying and determining the said complaints, as by the annexed writ we are commanded.

“ Dated this 18th day of November, A.D. 1865.

“ By order of the said court.

“ (Signed) JOHN MACDONALD,

“ Chairman of the said Court of Revision.”

In the same Michaelmas term, on motion of *Mr. Kerr*, counsel for the relator, a rule *nisi* was granted calling upon the Court of Revision to show cause why the return should not be quashed, on the following grounds: 1st, The return sets forth that the complaints were not heard, and that at the same time they were decided, and that the judge of the County Court refused to revise such decision. 2nd, That the return states that no notice or sufficient notice was given, and admits that notice to the clerk was given, which was all the notice required. 3rd, That the return sets forth that the time had elapsed for revision of the roll when the same was revised. 4th, The return does not show what notice was given, or its nature, but simply it appeared to the court the notices were insufficient; and to show cause why a *mandamus* absolute should not issue, etc.

During the same term *C. S. Patterson* showed cause, citing *In re the Judge of the County Court of Perth and J. L. Robinson*, 12 C. P. 252; *The Queen v. The Mayor of London*, 13 Q. B. 30; *The Queen v. St. Saviour's, South-*

wark, 7 A. & E. 925; *Regina v. Justices of Yorkshire*, 13 Jur. 447; *Regina v. Payn*, 3 N. & P. 165; Tapping on Mandamus, 372.

M. C. Cameron, Q.C., and *Kerr* supported the rule, and cited *The Queen v. The Mayor of Rochester*, 7 E. & B. 928; *In re Justices of York and Peel ex parte Mason*, 13 C. P. 159; *Rex v. Mayor of York*, 5 T. R. 66; *Rex v. Mayor of Lyme Regis*, 1 Doug. 79.

MORRISON, J., delivered the judgment of the court.

The substantial question raised by this application is whether the ground submitted by the defendants for not hearing and proceeding to the trial of the matters complained of by the relator, viz. that due notices were not given to the parties in accordance with sub-section 10 of section 60 of the Assessment Act, was a sufficient and valid reason.

By section 58 it is provided that at the times or time appointed the Court (of Revision) shall meet and try all complaints in regard to persons being wrongfully placed upon or omitted from the roll, or being assessed at too high or too low a sum. By sub-section 2 of section 60, if a municipal elector thinks that any person has been assessed too low or too high, or has been wrongfully inserted on or omitted from the roll, the clerk shall, on his request in writing, give notice to such person, and to the assessor, of the time when the matter will be tried by the court, etc.; and by sub-section 7 the clerk shall prepare a notice according to the form therein set out for each person; and the 8th and 9th sub-sections provide the mode by which the clerk shall effect service on residents and non-residents; and by sub-section 10 it is enacted that every notice required by those sub-sections "shall be completed at least six days before the sitting of the court."

It appears that the court met on the 22nd of May, and it was then objected by counsel for the parties, and was admitted that the six days' notice had not been given, the fact being that only five days' notice had been given. The court gave effect to the objection and declined to hear the matters of complaint; and the court before it adjourned announced that it would again meet on the 30th of May; that in the

meantime new notices could be given, there being sufficient time for that purpose, and that the appeals would then be heard. It does not appear that the relator in the interim took any step with a view of having new notices served, but he attended the court on the 30th, when the court, being informed that no notices had been given, decided that it had no jurisdiction to try the matters; and the roll was finally revised under the 59th section.

We cannot say that the decision of the Court of Revision is erroneous. It was argued on the part of the relator that the neglect of the clerk, or a failure by him in the performance of his duty, ought not to have prevented the complaints being heard, and that all that was incumbent on the relator was to make a request, under sub-section 2, to the clerk. Upon an examination of section 60, and its sub-sections 2, 7, 8, and 10, which bear on this application, we find that they are all imperative by force of the Interpretation Act, and when we consider the object of the complaints made by the relator we cannot overlook the plain words of the statute. The legislature clearly intended that in all cases of objection by third parties a notice of complaint must be given to the party complained against at least six days before the sitting of the court at which it is to be heard, and that such notices should be prepared and given in due time by the clerk.

It was also argued that as the parties by their counsel appeared before the Court of Revision, they waived any objection to the notice, and that the court should have proceeded to hear and determine the complaints. At first we thought there was something in the argument, but after a good deal of consideration we do not think we are at liberty to decide, in the face of a plain enactment which declares that six days' notice at least shall be given, that because a party appears to state that he has not had the notice required by the statute, that in that case five or a less number of days is sufficient, and to hold that his protest of not having notice is a waiver of it, and that in a proceeding the object of which is to deprive him of a franchise or right, or to make him liable to taxes or to increase them.

If the parties complained against did not appear on the

22nd of May, it would have been the duty of the court, before proceeding *ex parte*, under the 13th sub-section, to have ascertained whether due notice had been given to the respective parties, and if it appeared that only five days' notice had been given it would hardly be contended that the court could have heard the appeals; and surely, if their counsel appeared to notify the court of the want of notice, they should not therefore be placed in a worse position. The language of the Act is plain and unambiguous. If the mode of proceeding provided by the statute is insufficient, or inconvenient, or open to abuse, the remedy is with the legislature. For this court to say that five days' notice or any less number is sufficient would be to assume a legislative authority.

By the 171st section of the Assessment Act, if the clerk refuses or neglects to perform any duty required of him by the Act, for every offence he shall forfeit \$100; and by the 173rd section if he wilfully omits any duty required of him by the Act he shall be guilty of a misdemeanour, and liable to a fine of \$200 and imprisonment. As Lord Denman said in *King v. Burrell* (12 A. & E. 467), these are "wise and prudent provisions to secure the due execution of the Act by officers whose duty it is to learn their duty, and to do it accordingly."

We are therefore of opinion that the rule should be discharged, as the defendants in our judgment properly decided that they could not hear and determine the matters of appeal and complaint.

If the relator had made out a case for our interference, and it appeared that the want of the remedy would be injurious to the municipality, we are not prepared to say that a *mandamus* to the Court of Revision would be the proper proceeding, for by the 59th section of the statute it is enacted that all the duties of the court which relate to the revising of the rolls shall be completed, and the roll finally revised by the court, before the 1st of June in every year. Here they were finally revised on the 30th of May. The proper course, we think, would be found to be a *mandamus* to the mayor to summon the court to meet (under the authority

given him by the 55th section) with a view to hear and determine the matters complained of, due notices being first given to the respective parties.

Rule discharged, with costs.

THE QUEEN v. THE MAYOR OF THE TOWN OF CORNWALL.

Municipal Corporations—Vacating seat by insolvency—Practice—C. S. U. C. ch. 54, secs. 121, 122.

On application for a *mandamus* to the mayor of a town to issue his warrant for a new election in place of one M., a member of the council, whose seat it was alleged had become vacant by his having applied for relief as an insolvent debtor—*Held*, that the vacancy must first be established by *quo warranto*, and that *mandamus* was not the proper remedy.

IN Trinity term last *Kerr* obtained a rule *nisi*, calling upon George C. Wood, mayor of the town of Cornwall, to show cause why a writ of *mandamus* should not issue to compel the mayor to issue a warrant under his signature, requiring the returning officer appointed to hold the then last election for the centre ward of the town of Cornwall, or other the proper officer duly appointed, to hold a new election to fill the place of John S. M'Dougall, whose seat in the council had become vacant, the said M'Dougall having applied for relief as an insolvent debtor, and because he had assigned his property for the benefit of his creditors.

The affidavits on which the motion was founded set out that M'Dougall was elected a councillor for the centre ward of the town of Cornwall in January 1865; that he accepted the office and acted as such; that some time in May last M'Dougall called a meeting of his creditors under the Insolvent Act of 1864; that the notice calling such meeting was published in the *Canada Gazette*, and that M'Dougall made an assignment of his estate and effects under the Insolvent Act to one Adams, and that Adams after the assignment was in possession of the goods of M'Dougall; that the relator was an inhabitant of and an elector of the town of Cornwall, and voted without objection at the then last election in the said centre ward; that no election had been held to supply the vacancy, if any, caused by the insolvency of the said M'Dougall.

The other was an affidavit of one Eligh, a constable, who swore that he did, on the 29th of July 1865, serve Mr. Wood, the mayor, with a duplicate notice attached to his affidavit. The notice attached was signed by the relator as an elector, and addressed to G. C. Wood, Esquire, mayor, etc., as follows:—

“Take notice that John S. M'Dougall, formerly a councillor for the centre ward of the corporation of the town of Cornwall, has made an assignment under the Insolvent Act of 1864, whereby his seat in the council has become vacant; and take notice that you are hereby required, under section 122 of chapter 54 of the Consolidated Statutes of Upper Canada, to issue a warrant for the holding of an election under the said section to fill the vacancy; and that if you fail to do so, an application will be made to the Court of Queen's Bench for a writ of *mandamus* to compel you to do so, and that you will be compelled to pay the costs of such application.

“Dated the 18th of July 1865.”

In Michaelmas term last the *mandamus nisi*, with the return of Mr. Wood, the mayor, was filed, which was in substance as follows:—

I cannot by warrant, etc., require the said returning officer, etc., to hold a new election to fill the place of John S. M'Dougall, whose office and seat as councillor is alleged to have become vacant, because the alleged vacancy is a disputed vacancy, the said M'Dougall having since the alleged act of insolvency on the 1st of June 1865, and since his alleged application for relief as an insolvent debtor, exercised the said office of councillor, by attending the meetings of the council, and no such vacancy having been declared to exist by the said council, or by court of competent authority. I further return that I have no authority as mayor to declare the seat of the said M'Dougall vacant, as I am not authorized by statute or otherwise to call evidence and to adjudicate as to the truth of the said alleged vacancy; and in the absence of any action on the part of the council declaring the seat vacant, I have no power; and I humbly submit that I should not be compelled by the order of this honourable court to require

by my warrant as aforesaid the holding of a new election to fill the alleged vacancy until the fact of a vacancy is ascertained by proceedings in the nature of a *quo warranto*.

During the same term, on motion of *Mr. Kerr*, a rule was granted calling on *Mr. Wood*, the mayor, to show cause why his return to the writ should not be quashed, and a writ of *mandamus* absolute should not issue upon several grounds—among others, that the vacancy was not a disputed one, by reason of M'Dougall's attending meetings of council or otherwise; that it was not necessary that the vacancy should be declared to exist by the council or any court, and that it was the duty of the mayor to have issued his warrant without waiting for the vacancy being ascertained by proceedings in the nature of a *quo warranto*.

C. S. Patterson and *Robert A. Harrison* showed cause during that term, and took various exceptions to the writ, and contended, among other things, that the office was full, and that the proper remedy was by *quo warranto*. They cited *The Queen v. Powell*, 1 Q. B. 352; *The Queen v. Mayor of New Windsor*, 7 Q. B. 908; *Mayor of London v. The Queen*, 13 Q. B. 41; *Frost v. The Mayor of Chester*, 5 E. & B. 531; *The Queen v. Phippen*, 7 A. & E. 966.

M. C. Cameron, Q.C., and *Kerr*, supported the rule, citing *Rex v. Robbison*, 1 Str. 555; *The Borough of Bossiny*, 2 Str. 1003; *Case of Aberystwith*, 2 Str. 1157; *Rex v. Mayor of Stafford*, 4 T. R. 690; *Rex v. Mayor of York*, 5 T. R. 74; *Rex v. St. Catharine's Dock Co.*, 4 B. & Ad. 363; *Rex v. Parry*, 6 A. & E. 810; *The Queen v. Quayle*, 11 A. & E. 508; *Rex v. Overseers of Canton*, 1 Barnardiston, 299; *Tapping on Mandamus*, 288, 349, 371.

MORRISON, J., delivered the judgment of the court.

The main question that arises in this case is whether this application for a *mandamus* is the proper remedy.

It appears that *Mr. M'Dougall* was elected a councillor for the centre ward of the town of Cornwall at the usual annual election, and that he accepted the office and exercised it up to the time of the application. It is alleged that

in the month of May last M'Dougall called a meeting of his creditors under the Insolvent Act of 1864, and made an assignment of his estates for their benefit; and it is contended, under the 121st clause of our Municipal Corporations Act—which enacts that in case a member of council applies for relief as an insolvent debtor, or assigns his property for the benefit of creditors, his seat in the council shall thereby become vacant—that Mr. M'Dougall's seat became vacant, and that it was the duty of the defendant, under the 122nd clause, without any further act or proceeding, to issue his warrant to fill such vacancy, notwithstanding that M'Dougall was still filling and exercising the office. The fact that M'Dougall was duly elected to the office, and was never removed or resigned his office, and was *de facto* exercising the office of councillor, *prima facie* shows that the office is full; and whether M'Dougall applied for relief as an insolvent debtor, etc., are facts, the truth of which must be ascertained and brought under the notice of the head of the council in some way or other before he can issue his warrant.

The 52nd clause of the English Municipal Corporations Act, 5 & 6 Wm. IV. ch. 76, provides that if any person holding the office of councillor, etc., shall apply to take the benefit of an Act for insolvent debtors, etc., such person shall thereupon become disqualified, and shall cease to hold the office of councillor, and the council shall thereupon declare the office to be void, and shall signify the same by notice in writing, etc., and the office shall thereupon become void. Under that clause it has been held that the office is not void until the vacancy is duly declared (*Regina v. Mayor, etc., of Leeds*, 7 A. & E. 963). Our statute is unfortunately silent as to the mode of declaring the vacancy.

In the same English Act, section 54, which refers to bribery at elections, is in effect somewhat like our 121st clause. It enacts that any person committing the offence of bribery, and being lawfully convicted thereof, “shall be for ever disabled to hold, exercise, or enjoy any office or franchise to which he then shall, or at any time afterwards may, be entitled as a burgess of such borough, as if such person was *naturally dead* ;” and although there is no decided case

under this clause, Mr. Grant, in his Treatise on Corporations, page 234, in commenting on this 54th section, says: "The effect, therefore, of an adverse judgment in a prosecution under this enactment is to strip the Burgess *ipso facto* of his corporate character and rights; and it does not seem necessary, under the peculiarly strong terms used" (much stronger than our 121st clause), "that the corporation should go through the ceremony of removing him, but that they may fill up his place by a fresh election, as though he had terminated his natural life. But the proper course for the corporation to take, in case such person should persist in acting as a corporator, notwithstanding such judgment, is not to disfranchise, for that is not the correct course in cases of defective title, but to obtain an injunction in the nature of *quo warranto* to oust him. He might also, it is probable, be indicted as for a misdemeanour in acting in his place or office in contempt of an Act of Parliament." These remarks are equally applicable to the case before us.

In the case of *The Queen v. The Mayor of Cambridge* (12 A. & E. 702), in which the effect of the statute 9 Geo. IV. ch. 17, came in question—which statute enacted that any person who shall thereafter be elected, etc., to the office of mayor, etc., shall within one calendar month next before, or upon his admission into the office, make and subscribe the declaration therein set forth, and the 4th section of which provides that if any person elected, etc., into any of the offices mentioned shall omit or neglect to make the declaration, such election, etc., shall be *void*, and it shall *not* be lawful for such person to do any act in the execution of the office. Lord Denman, in giving judgment, says: "I decide, however, upon the ground that, notwithstanding the enactment in statute 9 Geo. IV. ch. 17, which declares the election 'void,' it is clear that the party could not have been removed without a *quo warranto*. In the former Acts similar words are used, to which effect could be given only by *quo warranto*. It could not be denied that a person disqualified under those Acts was an officer until he was so removed."

These authorities go to show that the relator has miscon-

ceived his remedy; but without them the very nature of the case suggests that the remedy most expeditious and convenient, as well as consonant to the principles which guide us in other cases, is that by *quo warranto*. In that case the party himself is called upon to answer, and he must either admit or deny the alleged fact which would disqualify him or disentitle him to exercise the office. Under the rule in this case the party most interested is not before the court, although holding the office *de facto*.

Upon this ground alone we think the application must fail. In the case of *The King v. Bankes* (3 Burr. 1452, 1 W. Bl. 445) it was held, upon precedents there cited, as upon the reason of the thing, that the rule could not proceed because the name of the acting mayor was not in the rule, he being in the possession of the office, and materially interested in the event of the question; that he ought to be heard in defence of his right before the issuing of a *mandamus* to proceed to the election of another in his stead.

We are therefore of opinion that the rule should be discharged, and with costs.

The only affidavit filed by the relator in support of his application is the affidavit of Mr. Allen, a member of the council of this corporation. One would have thought that before he became a party to a proceeding of this kind he would have first taken some step in the council for the amotion of Mr. M'Dougall, if he was of opinion that he retained his seat contrary to law, and so have avoided all this litigation. We also note that that gentleman, when referring in his affidavit to the alleged vacancy, qualifies it by the words "if any," evidently showing that he had doubts on the subject.

Rule discharged, with costs.

THE QUEEN v. RUBIDGE.

24 Vict. ch. 49—*Alteration of survey—Closing up streets.*

C. owned township lot 32, and H. lot 31 adjoining it on the east. In 1856 H. laid out part of 31 into village lots, according to a registered plan, which showed streets called first, second, third, and fourth streets, etc., running from east to west across the block, to the east limit of lot 32. In 1858 C. laid out the east part of lot 32 by a plan also registered, by which a street called Augusta Street ran north and south along the east side of 32, and from it streets ran westerly numbered 1, 2, 3, 4, etc., corresponding to and a continuation of first, second, third, and fourth streets on H.'s block, Augusta Street only intervening. Village lots had been sold on street 4 on C.'s block, but none on fourth street on H.'s land, and the closing this last-mentioned street would not shut out a purchaser of any lot from access to the nearest highway.

Held, that under 24 Vict. ch. 49, the owner of H.'s block might by a new survey and plan close up fourth street on his land; for the laying out a street in continuation of it by C. did not make all one street, so as to render the proviso in that statute applicable.

APPEAL from the Court of General Quarter Sessions of the Peace, in and for the United Counties of Stormont, Dundas, and Glengarry, under Consol. Stat. U. C. ch. 113.

This was an indictment for nuisance, in stopping up a street called "Fourth Street," in Hodges' block, in the village of Morrisburg.

The defendant was arraigned at the sittings of the court in December 1865, and pleaded not guilty. Upon the trial it appeared in evidence that one Casselman was the owner in fee-simple in possession of lot number thirty-two in the first concession of the township of Williamsburg, and one James Hodges was the owner in fee-simple in possession of lot number thirty-one in the same concession and township, being adjoining lots, the latter lot lying east of the former.

In the year 1856 the said James Hodges, in pursuance of the Act 12 Vict. ch. 35 (now Consol. Stat. U. C. ch. 93), made a survey of part of said lot number thirty-one, and deposited and filed a plan thereof in the registry office for the county of Dundas, within which both lots were situate, in pursuance of the said Act, showing streets running east and west through the said lot so laid out by him, and called respectively first, second, third, fourth, and fifth streets; and the said land so laid out was called Hodges' block.

In the year 1858 the said Casselman, in pursuance of the

said Act, filed and deposited in the same registry office a plan of the east part of said lot number thirty-two, dividing the east side of that lot into village lots, and showing streets numbered 1, 2, 3, 4, and 5 respectively, running east and west, and a street called Augusta Street running north and south along the east side of said lot number thirty-two; and the said land so laid out was called "Casselman's block."

The east side of Augusta Street in Casselman's plan formed the west boundary of the land laid out into village lots by the said James Hodges by the said survey and plan. The streets numbered 1, 2, 3, 4, and 5 in Casselman's block corresponded with first, second, third, fourth, and fifth streets in Hodges' block. None of the lots abutting on fourth street in Hodges' block had been sold, and the shutting up of fourth street in Hodges' block did not shut out any person who had bought any lot from access to the nearest public highway. Lot number eighteen in Casselman's block (a corner lot on the south side of 4th street, and west side of Augusta Street) had been sold and built upon, and was owned by Fetterley, the private prosecutor. The street running north and south in Casselman's block, called Augusta Street, was opened up beyond and north of fourth street in Hodges' block and street number 4 in Casselman's block; and statute labour had been done on Augusta Street by order of the municipal council of the township of Williamsburg, within which the said blocks were situate, and Augusta Street was the nearest public highway to the lot owned by Fetterley, and in fact adjoined it. Both these blocks were original divisions of the village of Morrisburg. Two other lots beside Fetterley's had been sold in Casselman's block.

On the 28th of April 1865 the defendant, who was at that time the owner in fee-simple in possession of the original division aforesaid called Hodges' block, in pursuance of 24 Vict. ch. 49, caused a new survey and plan of the original division aforesaid called Hodges' block to be made, in accordance with Consol. Stat. U. C. ch. 93, and on the same day deposited and filed the plan in the registry office for the county of Dundas, partially cancelling and making void the first survey and plan of the said block

called Hodges' block, and the division of the land thereby into lots, streets, and commons.

By this survey and plan and registration thereof the defendant assumed to cancel fourth street on Hodges' block, and afterwards proceeded to fence it up; and for that act this indictment was preferred.

The learned chairman charged the jury that if they found street 4 in Casselman's block was the same as fourth street in Hodges' block, and was a continuation of that street by Casselman; and if Gibson's or Fetterley's lot abutted on street 4 in Casselman's block, and was sold by Casselman previous to the new survey and plan of Rubidge, and the defendant closed up fourth street on Hodges' block, then they should find the defendant guilty.

Defendant's counsel objected to this charge, and submitted that the jury should have been directed that if no lot had been sold on Hodges' block, and if the shutting up of fourth street on Hodges' block did not shut out Fetterley, or any other lot owner, from access to the nearest highway, then the jury should acquit.

The jury found the defendant guilty.

Immediately after the rendering of the verdict, counsel for the defendant moved for a new trial for misdirection, on the ground of objection taken to the chairman's charge, and because the verdict was contrary to law and evidence, which the court, after hearing counsel on both sides, refused; and the conviction was affirmed by the court, for the reason that the alteration of the original survey of Hodges' block by Rubidge, the defendant, came within the proviso of the said Act 24 Vict. ch. 49, and because the chairman's charge was right.

The defendant thereupon appealed to this court.

Blake, Q.C., for the appellant.

Robert A. Harrison, contra.

MORRISON, J., delivered the judgment of the court.

We are of opinion that the judgment of the court below should be reversed.

It is quite clear that under the provisions of the 24 Vict. ch. 49, the defendant was entitled to make a new survey and plan of Hodges' block, and to partially cancel the survey and plan previously made, subject to the proviso in that Act contained—that no part of any street should be altered or closed up, upon which any lot of land sold in such original division abutted, or which connected any such sold lot with, or afforded means of access therefrom to, the nearest public highway. The defendant, under the authority of that Act, made a new survey and plan, and he cancelled a portion of the first survey, including in such cancelled portion "Fourth Street" in question—a street on which, as appears by the case, no lot abutting had been sold, etc., and consequently not a street within the proviso. And the defendant having complied with the provisions of the Act, he had a perfect right to deal with the cancelled portion by fencing it or otherwise disposing of it, according to the new survey.

It was contended on the part of the prosecution that the defendant was not justified in altering his plan so as to shut up "Fourth Street," on the ground that Casselman, the proprietor of the adjoining lot, had, after the filing of the first plan of Hodges' block, laid out his land so that the street numbered "4" on his plan ran opposite to and was in effect a continuation of "Fourth Street" on defendant's block; and it was urged that by Casselman so doing the two streets became one street for all purposes, and as lots had been sold abutting on "4" street on Casselman's block, the proviso in the Act applied, and the defendant was not authorized to shut up the street in question. We cannot assent to that view of the case. No authority was cited in support of such a conclusion, and we cannot find any expression in the statute pointing to or open to such a construction.

The 24 Vict. was evidently passed to enable proprietors of such original divisions to cancel or partially cancel and vary surveys and plans made under the provisions of ch. 93, Consol. Stat. U. C.—many of such surveys, from various causes that might be suggested, becoming unsuitable for the purposes originally designed, the legislature only imposing the

restriction contained in the proviso to protect the rights of purchasers of lots abutting on streets in such original divisions.

The defendant, in our judgment upon the case stated, was entitled to an acquittal, and the learned chairman should have so directed the jury. The point in question being purely a matter of law, there can be no object in sending the case down for a new trial, and the judgment in the court below will be arrested.

Judgment arrested.

M'ILROY v. HALL.

Seduction—New trial—Misconduct of magistrate in taking affidavit.

New trial granted to defendant in an action of seduction.

It was stated in an affidavit in support of the rule that the plaintiff had sworn before a magistrate that defendant never had criminal connection with her. The magistrate, in an affidavit used on showing cause, stated that the defendant's brother S., with the girl said to have been seduced, and her mother, came to him together, saying that the girl was going to clear his brother, that his mother was very ill, and the rumour was affecting her very much; that he, the magistrate, wishing to do something to let the old lady die easy, and at the same time to let the girl have a chance to swear the child on S., inserted in the affidavit taken before him the words *criminal* connection instead of *carnal* connection. Such conduct very strongly censured.

THE plaintiff brought this action (commenced on the 12th of August 1865) for the seduction of his daughter Sarah, who was delivered of a child on the night of the 13th December 1864. The jury found in his favour, and gave \$400 damages.

D. B. Read, Q.C., obtained a rule *nisi* for a new trial in Michaelmas term last, to which *McCarthy* showed cause in this term.

The facts sufficiently appear in the judgment of the court, delivered by

DRAPER, C.J.—The rule was granted exclusively on affidavits, the defendant himself unequivocally swearing that he never had connection with the plaintiff's daughter at any time or place whatever, and supporting his statement by several affidavits asserting circumstances material

to be considered in reference to the defence, and offering an explanation why he was not better prepared at the trial. He also takes the ground of surprise at the testimony of the plaintiff's daughter Sarah, as she had on the 20th day of July 1864, before a justice of the peace, sworn that the defendant "never had criminal connection" with her.

Several affidavits were filed in answer. The plaintiff's daughter, among other things, swore that "the defendant did promise me reward and inducement to make the affidavit. He offered to give me the sum of \$250, and afterwards stated that it would be fifty pounds in my pocket. I incline to think the word "brother" has been inadvertently omitted after the word "defendant," and that she meant to swear this proposal came from the defendant's brother Samuel, and not from himself. This deponent also swore that at the time she made the above-mentioned affidavit she did not know she was with child, though Dr. Corbett had made affidavit that he examined her person on the 30th June 1864, and found she was pregnant, and told her so, and that she was confined on the night of the 13th December following of a child of full maturity. The plaintiff himself has made two affidavits, though I notice in the jurat of one that it is stated the affidavit was read over and explained to the said William M'Ilroy, "*the defendant*," a careless blunder, for which the illiterate *deponent* is not answerable.

I entertain a strong feeling of repugnance to granting new trials in cases of this description, among other reasons, from a conviction which gains strength in my mind every year, that such trials produce more harm than good. But after a careful consideration of the affidavits, I think this rule cannot properly be discharged, and that a jury ought to pronounce upon the conflicting irreconcilable statements contained in them. I think as strong a case is made out for a new trial as was made out in *Barclay v. Alexander*, in which in Trinity term 1849 this court granted a new trial in a similar action,* and that we should make this rule absolute on payment of costs.

* Not reported.

I have abstained advisedly from giving at this moment any analysis of the affidavits filed. I have fully satisfied my own mind that it is for the ends of justice that the decision of another jury should be had upon all the testimony before us, and I do not desire to express the slightest hint of any opinion which way that decision should be. Without seeing and hearing the witnesses I could not bring myself to a satisfactory conclusion.

There is, however, one matter to which we think it proper to draw attention. It is stated above that the plaintiff's daughter had made affidavit before a magistrate that the defendant never had criminal connection with her. The magistrate makes an affidavit in support of the plaintiff's opposition to the rule, in which he states that Samuel Hall, the plaintiff's wife, and their daughter Sarah, came to his house; that Samuel Hall said they came to get an affidavit made; that Sarah M'Ilroy was going to clear his brother, the defendant in this cause; that the magistrate said, "This is an unprecedented case, and I will have nothing to do with it;" that Samuel Hall said his mother was very sick, and the rumour was affecting her very much; that the magistrate left the three in his kitchen, and he went into his sitting-room to consider, and he thought he "would do something to let the old lady die easy, so I wrote a few lines, and instead of 'having carnal connection,' I wrote 'criminal connection,' to let the girl have a chance to swear her child on him."

The magistrate was given to understand that the object of her coming to him was to make an affidavit to clear the defendant, and that he so understood it is plain from his statement that he avoided using the term "carnal" and substituted "criminal," the former expression carrying out the object announced of clearing the defendant, while the word criminal did not deny there had been carnal intercourse, but only that it was not such as to subject the defendant to criminal proceedings.

If the magistrate desired to let the girl have the chance he speaks of he must apparently have suspected, if not believed, that she was with child; forming, as the result shows,

on some unexplained ground, a more correct opinion of her condition than she then entertained, for she swears she did not then know she was with child. But if he entertained such a suspicion, he could not have also thought that she could truly make an affidavit to clear the defendant; and then he certainly ought not, even for the charitable purpose of "letting the old lady die easy," have drawn up an equivocating affidavit, which he permitted the girl to swear to, without so far as appears making her aware of the equivocation, but under the influence of another charitable purpose, namely, that of giving her a chance at some future time of swearing her child on the man whom she came to clear of the unfounded rumour of having had carnal intercourse with her.

The practice of administering extrajudicial oaths is bad enough when it is only to be attributed to ignorance of the proper duties of the office of a justice of the peace; but when in addition the magistrate avows that he prepares an affidavit in a form which he scarcely could have used without thinking that the intending deponent was prepared to swear to something untrue, it becomes utterly indefensible. If he was aware that the defendant, as she has sworn (or his brother), had promised her reward or inducement to make the affidavit, had offered to give her \$250, it might explain his motive in framing the affidavit as it is, but it would not diminish the censure to which such conduct is open.

If a commissioner for taking affidavits in this court were proved to have acted in a similar manner, we apprehend he would not long possess the opportunity of abusing the trust reposed in him.

Rule absolute, on payment of costs.

WIXON v. PICKARD.

Trespass—Pleading—Right of way—Covenant—Breach committed by plaintiff's direction.

Plaintiff sued defendant for taking his cattle. *Plea*, justifying as for distress damage feasant on defendant's land. *Replication*, that the plaintiff demised to defendant the land mentioned in the plea, reserving a right of way along the west side thereof; and the alleged trespass was the use of such way. *Rejoinder*, that the trespass was beyond the right of way. *Surrejoinder*, that at the time of the lease there was a fence along the east side of the way to prevent horses, etc., straying therefrom; that defendant covenanted by the lease to keep such fence in repair, but removed it, whereby the plaintiff's horses strayed from the way upon defendant's land. *Rebutter*, that the lease contained covenants allowing the plaintiff to enter on the land and view state of repair, and that defendant would repair according to notice; that the plaintiff directed the defendant to remove the fence along the east side of the way, and use the rails for other purposes, which defendant, with the plaintiff's assistance, and as the act of the plaintiff, accordingly did; and this is the removal referred to in the surrejoinder.

Held, that upon the evidence set out below the jury were justified in finding the rebutter proved by defendant—whether it was a good answer in law to the surrejoinder not being a question for them.

The jury were directed that if the removal of the fence was the plaintiff's act, he was bound, having thus thrown open the way, so to use his right over it as not to injure the defendant's land. *Semble*, that the question of plaintiff's duty in this respect was not really raised by the pleadings, but that the charge was correct.

THE declaration contained two counts, one in trespass, the other in trover, for horses, cattle, and pigs.

The defendant pleaded to each count—1st, Not guilty. 2nd, That he was lawfully possessed of part of the east half of lot 22, in the south boundary concession of Blanshard containing twenty-five acres, except two acres situate in the middle of the lot, on which was a house and orchard; and justified the taking the said horses, etc., damage feasant, and impounding the same.

The plaintiff replied to the surrejoinder, that by indenture of lease, dated the 3rd of November 1863, the plaintiff demised to the defendant the lands described in the second plea on the terms and conditions therein mentioned, one of which was that the plaintiff should have a right of way along the west side of said premises (and the road extended from the highway at the south end of said premises, being a portion of the lot demised), and the alleged trespassing was the use of such highway.

There was a similar replication, omitting the words between brackets, to the fourth (or second special) plea.

To the first replication the defendant rejoined that the trespass by the horses, etc., was in excess of and beyond the right of way and in and upon other parts of the close, and on other occasions and for other purposes.

To the second replication there was a similar rejoinder.

The plaintiff surrejoined to the first rejoinder, that by the lease in the plea mentioned, at the time of the demise, there stood a fence on the land along the easterly limit of the right of way, to prevent horses, etc., from straying from the right of way and entering the other portions of the premises demised; and the defendant covenanted by the lease to keep that fence in repair, but did not do so, but removed the same, by reason whereof, and through no negligence of the plaintiff, the horses, etc., strayed from the right of way and entered upon the premises of the defendant.

To the second rejoinder there was a similar surrejoinder.

Rebutter to the first surrejoinder, that the lease contained covenants whereby it was lawful for the lessor to enter upon the premises and view the state thereof, and that the lessee would repair according to notice, and that the plaintiff, in pursuance of the covenant to repair in the surrejoinder mentioned and the covenants herein set forth, entered upon the premises and directed defendant to remove the fence running along the easterly limit of the right of way, and to use the rails of said fence in repairing the fence running along the westerly limit of the right of way, and in repairing other fences on the demised premises; that defendant, under the covenant and the directions of the plaintiff, and with the assistance and as the act of the plaintiff, removed the fence and the rails, and employed them in repairing as the plaintiff had requested; and such removal is the removal referred to in the surrejoinder.

Similar rebutter to the second surrejoinder.

It was then entered on the record, "The defendant also seeks to plead a second rebutter to each of the plaintiff's surrejoinders, as follows:"—

That the trespasses were not occasioned by the neglect of the defendant to keep the said fence in repair, but that

the horses, etc., escaped and came and were driven out of the premises of the plaintiff, which immediately adjoin the northern boundary of the defendant's close, into the defendant's close, and trespassed thereon, as in the pleas mentioned, in consequence of the plaintiff's own wrong in pulling down to an excessive and unreasonable degree and distance, and keeping down for an excessive and unreasonable time, a part of the fence forming the northern boundary of the defendant's close, and being the division fence between the premises of the plaintiff and defendant, notwithstanding the remonstrances of the defendant and his opposition thereto.

Issue was respectively taken by the plaintiff or defendant on the several foregoing pleadings, besides the special answers thereto respectively pleaded. There was no judge's order for taking issue and also answering, nor for the two rebutters, attached to the record.

The trial took place at London, in October 1865, before *Richards, C.J.*

The lease was put in, whereby the plaintiff leased twenty-five acres of land to the defendant, and it was agreed between them that the plaintiff was to have the privilege of a road on the west side of the land leased. This, though not so stated in the instrument, was evidently for the purpose of giving him an approach from the town line on the south and his own land on the north, to two acres which he had reserved out of the twenty-five acres mentioned, and on which was a house and an orchard. These two acres were on the west side of the lot of twenty-five acres, and about half-way between the town line and the plaintiff's land on the north. In the lease was a covenant on the defendant's part to repair the buildings and fences erected or to be erected on the premises at his own cost, the plaintiff finding or allowing on the premises all rough timber for the same, or allowing the defendant to cut so many timber-trees on the premises as should be requisite, and the plaintiff was authorized to enter and view the demised premises, which the defendant was to repair according to notice. At the date of the lease there was a fence, according to the weight of evidence not

a very good one, along the easterly side of the reserved road ; and after the defendant had entered he and his sons removed the fence, and, as was sworn at the trial, the plaintiff directed it to be done or expressed his desire that it should be done, and even gave some slight help in doing it.

It appeared further that at the time the lease was made there were not twenty-five acres south of the northerly fence as it then stood, and consequently this fence was removed some distance further north to give the defendant the stipulated quantity. By this removal the easterly side of the reserved road was left unfenced from where the north fence first stood to where it was placed further north, a distance spoken of as ten or fifteen rods. The plaintiff had horses, etc., on his land on the north of the fence, and he laid the fence open to let them through at various times to the two acres. It was sworn that the plaintiff was in the habit of leaving this fence open ; that defendant frequently put it up, but it was again left open, and the plaintiff though remonstrated with persevered in this course. His horses, cattle, etc., were thus at liberty to stray off his land through this opening ; and when through, there was nothing to restrain them within the reserved road. They frequently got on to defendant's premises, and he distrained them damage feasant and sent them to the public pound. It appeared that the plaintiff had notice of this and refused to pay the damages appraised and the costs, consequently the animals were sold, so far as was shown, in a legal manner.

The learned Chief Justice told the jury the substance of the issue was whether the fence was removed with the knowledge, by the direction, and with the aid of the plaintiff exercising the powers reserved to him by the lease ; that if he was on the demised premises, and in the exercise of his rights directed the removal of that fence with the view of repairing the other fences, and to further his own interest, and the removal was thereupon made, the issue was substantially proved for the defendant. He also directed them that if the plaintiff's horses, etc., went off the reserved road on to defendant's premises in consequence of the

plaintiff not taking care of them when using this road, the defendant had a right to impound them damage feasant.

The jury found for defendant.

M. C. Cameron, Q.C., obtained a rule calling upon the defendant to show cause why there should not be a new trial, the verdict being contrary to law and evidence, and for misdirection, in telling the jury there was evidence to sustain the defendant's rebutter, and in not telling the jury that the removal of a fence did not constitute a repair of the fence, and in allowing a positive covenant under seal to be set aside by verbal evidence, and in telling the jury that the plaintiff having allowed or directed the fence along the east side of the right of way to be removed, was bound to keep his cattle on the way, and not to allow them to stray upon defendant's close, whereas he should have directed, that if the defendant's premises were not properly fenced so as to keep out cattle, he could not legally distrain them damage feasant. He cited *Kelly v. Moulds*, 22 U. C. R. 467; *Goodwyn v. Cheveley*, 4 H. & N. 631; *Dovaston v. Payne*, 2 Sm. L. C. 124.

In Michaelmas term *Ferguson* showed cause, citing *Wilkinson v. Payne*, 4 T. R. 469; *Pickard v. Wixon*, 24 U. C. R. 416.

DRAPER, C.J., delivered the judgment of the court.

We agree with Mr. Cameron that all turns on the first rebutter.

The pleadings appear to us to raise the question thus: The plaintiff in the surrejoinder asserts the existence at the time of the demise of the fence on the easterly side of the road reserved, and that the defendant covenanted to keep that fence in repair, but instead thereof removed it, whereby the horses, etc., got off the road on to the land leased to the defendant. The defendant answers that the plaintiff had a right to enter and view the premises, and that the defendant was bound to repair upon notice; that the plaintiff did enter and directed the defendant to remove that fence and to use the materials in repairing other fences, and that defendant followed those directions, and with the plaintiff's help removed this fence, which is the removal spoken of and relied upon by the plaintiff.

Whether the rebutter is a good answer in law to the sur-rejoinder is not now in question. The plaintiff has put it in issue, and the jury had to decide, as a question of fact, was it proved. We think there was evidence to go to them upon each matter of fact asserted—that the plaintiff did enter upon the premises; that he did direct the removal of the fence in question, and what should be done with the rails of which the fence was made; that he gave some trifling help in the removal, and that what the defendant actually did was in general conformity with what the plaintiff told him he wished should be done. If the plaintiff's direction to do this, and the defendant's compliance with it, were proved to the satisfaction of the jury, the issue was maintained, and it was not a question for them whether such facts justified the removal of a fence which certainly came within the defendant's covenant to repair.

We do not think the question of the plaintiff's duty as to keeping the cattle within the line of the road, the fence having been removed as an act of the plaintiff, was really raised by the pleadings; but if it had been, as at present advised we think the charge was correct, and that the plaintiff having taken away the means of confining his horses, etc., within the road, has brought on himself the duty of so using his right over it as not to inflict injury on the defendant.

From the general aspect of this case, and of another recently before this court between the same parties,* we are strongly impressed with a conviction that we should lean as much as our sense of justice will permit against prolonging a litigation, which the parties seem willing to persist in even to their own utter ruin. We should, in our opinion, sustain the finding of the jury between them, unless on the clearest ground it is shown to be either against or wholly unsustained by the evidence, apart from any alleged misdirection. And as we think the case properly submitted to the jury, and that there was evidence to support the finding on the issue taken, we think this rule should be discharged.

Rule discharged.

* *Pickard v. Wixon*, 24 U. C. R. 416.

THE NIAGARA FALLS INTERNATIONAL BRIDGE COMPANY AND
THE NIAGARA FALLS SUSPENSION BRIDGE COMPANY v.
THE GREAT WESTERN RAILWAY COMPANY.

R. W. Cos.—Covenant to give and procure free passes—Construction—Demand.

The plaintiffs by deed, dated the 1st of October 1853, leased to defendants the railroad floor of the Niagara Falls Suspension Bridge, with the right to extend to other companies the privilege of crossing such bridge with locomotives and trains; the plaintiffs agreed to allow the directors and employees of the defendants, and such other railway companies as they should make arrangements with, free tickets to pass the bridge; and defendants agreed to allow from their own and procure from the railroad companies with whom they should arrange for the use of the bridge aforesaid free tickets for the directors and officers of the plaintiffs to pass over their respective railways.

Defendants in 1855 made an agreement with the New York Central R. W. Co. "to render more convenient their interchange of freight and passengers at the bridge," by which the New York Co. were to convey across the bridge on their cars the freight brought by them for the G. W. Co., etc.

Up to 1860 the defendants gave the directors and officers of the plaintiffs annual passes over their railway, and up to 1858 procured for them passes from the N. Y. Co.; but they then refused to give more than special passes over their own road, to be used only on the business of the plaintiffs, and limited to one trip; and as to passes over the N. Y. road, they contended that they had never been demanded, or if they had, that they were not bound to procure them.

Held—1. That defendants were bound by the covenant, and the passes could not be confined to the plaintiffs' business.

2. That the New York Co. was within the agreement, so as to entitle the plaintiffs to demand passes on that railway from defendants.

3. That a demand of the passes by the plaintiffs was necessary; for though the plaintiffs might not know with what other companies defendants had made arrangements, yet they would be aware, while defendants might not be, for what persons such passes were demandable.

4. That, taking the previous usage in giving tickets into consideration, the letters given below constituted a sufficient demand.

5. That considering such usage, which showed the intention of the parties at the time, and the inconvenience of a different construction, it might be held that the passes should be annual, not for each trip.

THE questions in this case arose upon a deed by which the plaintiffs, in consideration of the rents, covenants, and agreements thereafter contained, agreed to lease, and did thereby lease to the defendants, for a rental of \$45,000 per annum, payable half yearly, the railroad floor and structure of the Suspension Bridge, with the exclusive right to extend to other companies the privilege of crossing such railroad bridge with locomotives, trains, and cars carrying passengers and freight. The defendants covenanted to pay the rent, and to keep the premises, with certain exceptions, in repair. To make the agreement more explicit, certain explanations,

provisions, and stipulations were set forth, which each party covenanted and agreed to, and among them was the following:

Eleventh.—"The parties of the first part" (the plaintiffs) "to allow the directors and employees of the parties of the second part" (the defendants), "and such other railway companies as they shall make arrangements with, free tickets to pass the bridge; and the parties of the second part shall allow from their own, and shall procure from the railroad companies with whom they shall arrange for the use of the bridge aforesaid, free tickets for the directors and officers of the parties of the first part to pass over their respective railways."

It was also provided by the third clause of the agreement that "the possession and use of said railroad structure by the said parties of the second part is to carry with it the exclusive right to extend to other companies and persons the privilege of crossing such railroad bridge with locomotives, trains, and cars carrying passengers and freight, on such terms as they may agree to, subject however to the conditions and restrictions prescribed in this indenture to the parties of the second part."

The agreement was dated 1st October 1853.

The defendants made an agreement with the New York Central Railway Company on the 29th of September 1855, amounting to an arrangement for the use of the railway bridge, the particulars of which are sufficiently stated in the judgment, but it contained no provision for furnishing free tickets for the directors and officers of the plaintiffs' two companies.

Nevertheless, as was admitted, up to and including part of the year 1860, the defendants gave those directors and officers annual passes over their own railway, and up to the 1st of June 1858 procured them from the New York Central Company for such directors and officers in the terms of the covenant.

But since those dates respectively such passes had been discontinued. The defendants declined to give annual or special passes in general terms over their own railway, but offered to give passes entitled "Suspension Bridge Company's

director's pass," and stating on their face "to be used only on the Suspension Bridge Company's business," and limited to one trip. As to passes over the New York Central, the defendants contended they had never been demanded, or if they had been demanded, the defendants were not bound under their covenant to procure them.

The agreement between the plaintiffs and defendants and between the defendants and the New York Central Railway Company, with the correspondence, were set out at length in a special case for the opinion of the court, the questions stated being—

1. Is the Great Western R. W. Co. bound by the covenant in the lease?

2. Did the agreement between the Great Western and the New York Central entitle the bridge directors to demand passes over the New York Central from the Great Western?

3. Is the user of the bridge by the New York Central sufficient, under the agreement, to entitle the bridge directors to claim passes?

4. Is the Great Western bound to furnish annual passes over its own road and the New York Central, with or without demand of the bridge companies?

5. If demand required, is the letter of the superintendent, with letters of Messrs. Irving and Brydges, a sufficient demand with or without the former usage of delivery up to 1860?

6. Can the Great Western refuse to give other than trip passes, or confine those passes to journeys on Suspension Bridge business, and must passes be demanded by the bridge directors for each trip, whether over the Great Western Railway or the New York Central?

J. H. Cameron, Q.C., for the plaintiffs.

Anderson, contra.

DRAPER, C.J., delivered the judgment of the court.

There seems little room for contention as to the meaning of this covenant. It imposes an obligation on the parties in very plain terms, and the defendants appear to us rather to

strive to procure some variation or modification of the obligation, to put a new construction upon its language, than to deny that any obligation exists.

It has indeed been suggested that the covenant is not one enuring to the benefit of the shareholders of the respective companies in the broad form in which the plaintiffs claim its fulfilment; and it has been represented as an agreement, in consideration that the directors and employees of the defendants' company, and of such other railway companies as they shall arrange with, shall be allowed at all times to pass the bridge free of toll, the directors and officers of the plaintiffs' company shall have free tickets over the defendants' railway, and over such other railways as acquire a right from the defendants to the use of the bridge.

Whether the contract was more advantageous to the plaintiffs than to the defendants is not now the question. Even in this view, the defendants obtained a valuable consideration—one which indirectly at least might benefit the company; for the right to cross the bridge free might induce persons to enter the defendants' employment upon terms more favourable to the defendants than such persons would otherwise have accepted. We think, however, that the covenants as to permitting free passage over the bridge and granting free tickets over the railroads are to be looked upon as part of the consideration moving between the parties, upon which, taken altogether, the one granted and the other took the lease of the railway floor of the bridge, etc. We cannot find in the agreement any justification for qualifying the contract to give passes on the railroads by adding to such passes the words "to be used only on the Suspension Bridge Company's business."

Therefore, to the first question, "Is the Great Western Railway Company bound by the covenant?" we answer in the affirmative.

The second question amounts to this, whether by the agreement between the defendants and the New York Central the latter is to be deemed a company with whom the defendants have made arrangements extending to the latter the privilege of crossing the railway bridge with

locomotives, trains, and cars conveying passengers and freight. The agreement between the two railway companies is made "to render more convenient their interchange of freight and passengers at the Suspension Bridge." In the 7th article it provides that the freight brought to the Suspension Bridge by the New York Central Company to pass over the Great Western Railway is to be conveyed in the cars of the New York Central Company, and placed alongside the freight warehouse belonging to the Great Western Railway Co., which by article 8 the defendants are to put up on the Canada side of the bridge. As to passengers, by article 2 the defendants are to carry across the bridge in their cars all passengers and their baggage coming from the west, and to receive in the New York Central Company's depôt on the east side of the river all passengers coming from the east, and to carry them over in their cars to the Canada side; and by article 6 the defendants undertake not to permit any passenger trains of any other company than their own to cross the Suspension Bridge.

These arrangements between the railway companies appear to us sufficient to bring the New York Central Railway Company within the 11th article of the agreement declared upon, so as to cast upon the defendants the duty of procuring for the directors and officers of the plaintiffs' company free tickets to pass over the New York Central Railway; and therefore we answer the second question affirmatively.

The third question is also, as seems to us, answered for all the purposes of this suit, for the actual use made by the New York Central Company is not so much the question as the exercise of the power given by the plaintiffs to the defendants in the 3rd article of the agreement between them, to extend to other companies the right of crossing the Suspension Bridge with locomotives, etc.

As to the fourth question, we have arrived at the conclusion that a demand is necessary. It is true the defendants must be, while the plaintiffs may not be, cognizant to what companies the defendants may have extended the right of using the railway bridge; but, on the other hand, the

plaintiffs must know, while the defendants may not, who are the directors and officers for whom free tickets are demandable; and if we are right in our impression that each free ticket should contain the name of the person entitled to use it, there is a further reason for holding a demand necessary, by which the necessary information should be conveyed.

We are of opinion, taking the preceding usage in giving tickets into consideration, and Mr. Irving's letter of the 20th of May 1861, that Mr. Swann's letter of the 3rd of July 1861 constituted a sufficient demand.*

The case contains little throwing light upon the sixth question, except the admission that the construction placed by the defendants and acquiesced in by the plaintiffs was that the free tickets should be annual. We see no necessity for holding that construction to be erroneous. It was, we assume, the actual intention of the parties at the time, or it would not have been adopted when the matter was fresh, and before any such afterthought as the correspondence set out in the case had arisen. We are strengthened in determining that the passes should be annual by the fact that the same expression, "free tickets," is used in the plaintiffs' agreement to allow the directors and *employees* of the defendants to pass the bridge free. The word "employees" has a larger signification than the word "officers;" it may include a great number of individuals—artificers, mechanics, and labourers, who while employed on one side of the bridge might have their homes and families on the other. It would be a very inconvenient construction which would render it

* Mr. Irving's letter was addressed to Mr. Thomas C. Street, appointed by the joint board of the bridge companies to settle the matter in dispute with defendants if possible. It related chiefly to the right to New York Central R. W. passes, about which a suit was then pending in the United States, and a proposition which had been made to accept an annual sum as a commutation therefor, and declined in the present position of the suit to bring the matter before the defendants' board. "The free tickets over the Great Western," it was added, "are on a footing to enable you to accept them (should you be so disposed), and need not be now adverted to, except to instance the difference of the two positions. Those are placed at your disposal; the others we must apply for when required by you." Mr. Swann's letter of the 3rd July to defendants' managing director referred to the sentence in Mr. Irving's letter above quoted, and enclosed a list of the members of the plaintiffs' boards.

necessary for them to obtain free tickets every time they required to pass over, and equally inconvenient to the plaintiffs to grant them. We should, therefore, hold that a demand of an annual free ticket would be a demand sufficient within the contract. The parties can arrange if this conclusion, which is founded on the evidence of their own usage, is inconvenient.

On the whole, we are of opinion that judgment should be entered for the plaintiffs for \$1603·08.*

Judgment for plaintiffs.

IN THE MATTER OF THE PROPELLER GEORGIAN.

28 Vict. ch. 1—*Restoration of property seized under.*

Under sec. 11 of 28 Vict. ch. 1, for preventing outrages on the frontier, the court can only order restoration of property seized when it appears that the seizure was not authorized by the Act; and in this case, on the facts stated below, they refused to interfere, holding that the collector who seized had probable cause for believing that the vessel was intended to be employed in the manner pointed out by the 9th section.

IN Trinity term last, *M. C. Cameron, Q.C.*, obtained a rule calling on the Honourable R. Spence, Collector of Customs for the port of Toronto, to show cause why the propeller Georgian, seized by him on the 7th day of April last, or thereabouts, at the port of Collingwood, should not be released and restored to George Taylor Denison the younger, on whose petition, supported by a great many affidavits, the rule was granted—on the grounds that there was no ground for such seizure of the said vessel under chapter 1, 28th Victoria, or for detention of the same; or why the court should not make such other order as might seem fit; and on grounds disclosed in said petition, affidavits and papers filed.

The petitioner's title to the vessel, from his own statement and affidavits, appeared to be that on or about the 17th of January 1865 he purchased her, and that on or

* This was the amount agreed upon, as paid by the plaintiffs' directors for their travelling expenses on the defendants' railway, and on the New York Central Railroad.

about the same day an indorsement was made on the register of the vessel of the change of ownership by the Collector of Customs for the port of Toronto.

The only other affidavit which materially bore upon the question of ownership was one sworn by William Lawrence Macdonald on the 28th of November 1865, in which he stated that the Georgian was purchased in October 1864 from A. M. Smith and George Wyatt of Toronto "for the government of the late Confederate States," with money belonging to the said "Confederate States," and the bill of sale was taken in the name of one Bates then residing in Detroit, who held the vessel "subject to the order of the said Confederate Government and its agents;" that the vessel was so held till about the 17th of January last, when it was thought advisable by Bates that the title should be transferred from his name to that of some British subject friendly to the cause of the Confederacy, and it was arranged by the advice of Mr. Thompson, "the Commissioner of the said Confederate States," that Bates should transfer the vessel to the petitioner George T. Denison. The deponent swore he arranged the terms and conditions of sale, and told Bates what to ask and Denison what to offer, and he prepared and witnessed the execution of the deed of transfer. Denison gave his two promissory notes for \$6500 each, payable to Bates, who on the same day indorsed them to Macdonald's order, without recourse, which notes Macdonald delivered to Thompson without indorsing them. He further swore that one Cleary, who was secretary to Thompson, asserted that he owned the Georgian, and that Macdonald knew that long after the transfer to Denison Cleary was trying to sell her.

Besides his own affidavit the petitioner filed eleven other affidavits, negating the facts asserted upon which the seizure was made, and a warrant for her detention was subsequently obtained from the Chief Justice of the Court of Common Pleas. These affidavits did expressly contradict many statements asserted in the affidavits and depositions of Hyams and others which were before the court, and they explained and thus endeavoured to repel unfavourable

inferences which might otherwise be drawn from facts which were not denied.

The rule was enlarged, and cause was shown to it by *Robert A. Harrison* on the last day but two of this term (9th February).

The most important affidavit filed was that of the seizing officer, who stated that he was slightly acquainted during 1864 and in the beginning of 1865 with William Lawrence Macdonald, who was generally reported to be an agent of the late Confederate States of America; that on the 3rd of April 1865 he was officially notified that information had been received that the Georgian was being fitted out with hostile views against the United States, and was instructed to repair in person to Collingwood, and if necessary to detain her; that on the following day he found said Macdonald apparently in charge of her, and that his appearance there, and the notoriety of his connection with the so-called Confederate Government, gave rise to serious suspicions in respect to the uses to which the Georgian might be put; that on the 6th of April it was officially reported to him that Macdonald had been manufacturing implements of war in the city of Toronto, some of which had been found in a house in the city formerly occupied by him, which implements were in the possession of the police, and that they were intended to be put on board the Georgian for warlike purposes against the United States; that after taking legal advice he went again on board the Georgian and found Macdonald, who, as the collector thought, was in charge of her; that all he saw fully sustained his previous suspicion that she was not being prepared for the ordinary lake trade, and on inquiry the petitioner Denison informed him it was his intention to run the vessel early the next week for the purpose of towing rafts. This statement agreed with part of the information communicated to him, which was in effect that the propeller was to be run out of the port of Collingwood on the pretence of lawful purposes, but that afterwards possession was to be taken of her by some one on board, and to save appearances Mr. Denison was to be put ashore. From this, and from

other information connecting Macdonald with the manufacture of war material, and finding him on board, and so far as he could judge in charge, and thinking that the mode of carrying on the alterations going on on board the said vessel was intended to blind the authorities as to her fitness for service, and being satisfied there was nothing to prevent the Georgian from starting soon after a sufficient quantity of fuel could be procured, the Collector of Customs placed her in charge of the Customs officer at Collingwood, and had a portion of her steam machinery removed, and next day reported his proceedings to the Government, and received instructions to continue the detention; that, as he was informed and believed, a warrant for the detention of the vessel was obtained from the Chief Justice of the Common Pleas, which warrant the collector holds.

Other affidavits as to various facts confirming the suspicions of the collector were filed.

M^r Michael supported the rule.

DRAPER, C.J., delivered the judgment of the court.

The 9th section of 28 Vict. ch. 1, enables any collector of customs (and various other officers) to seize any vessel or vehicle, and all arms or munitions of war about to pass the frontier of the province for any place within any foreign state, where the character of the vessel or vehicle and the quantity of arms and munitions of war and other circumstances shall furnish probable cause to believe that the said vessel or vehicle, arms or munitions of war, are intended to be employed by the owner or any other person in carrying on any military expedition, raid, enterprise, or operations, within the territory or dominions of any foreign state with whom Her Majesty is at peace, and detain the same until the decision of the Governor be had for the restoration of the same, or until such property shall be discharged by the judgment of a court of competent jurisdiction.

The 10th section provides for the issue of a warrant to justify the detention.

The 11th section enables the owner of property so seized in Upper Canada to file his petition, setting forth the facts

of the case, in any of the superior courts, or in the County Court of the county where the seizure was made; and thereupon such court shall proceed with all convenient despatch, after causing due notice to be given to the officer making such seizure, to decide upon the said case, and order restoration of the property, unless it shall appear that the seizure was authorized by the Act.

The inquiry, therefore, is whether the collector *had probable cause*, from the character of the vessel or other circumstances, to believe that the vessel was intended to be employed as the 9th section sets forth; for if he had, then, under the 11th section, this court has no jurisdiction to order restoration, because then “the seizure was authorized” by the Act.

We observe that one reason given for the transfer of the vessel from the name of Bates to that of a British subject was that “the vessel had acquired a great deal of notoriety. She had been spoken of as the ‘Pirate Georgian,’ the ‘Privateer Georgian,’ etc., and she was besides under seizure for a breach of the revenue laws of this province.” This statement is in the affidavit of William L. Macdonald, already referred to, and this “notoriety” was therefore prior to the 17th of January, the date of the transfer.

We are all of opinion that there was probable cause for the collector to believe that the Georgian was intended to be employed contrary to the statute—strong probable cause, as the case appears on the affidavit of Macdonald, in reference to the purchase in January 1865; and we further think that the precise language of the 11th section gives this court no authority to order restoration, “unless it shall appear that the seizure was not authorized by this Act.” The 9th section clearly points out that a restoration may be granted by the Governor, not limiting the exercise of the authority as is done in respect to the courts by the 11th section, where, though the power to try and determine is full, the power to order restoration is not equally so.

We think, therefore, the rule must be discharged.

Rule discharged.

THE QUEEN v. ELLIS.

Certiorari—Notice—Practice.

Before applying for a *certiorari* to remove a conviction confirmed by Quarter Sessions, notice of the application must be given to the chairman and his associates, or any two of them, by whom the order affirming such conviction was made; and where a *certiorari* had been obtained without such notice, and a rule *nisi* obtained to quash such conviction and order, the *certiorari* was set aside.

J. A. Boyd obtained a rule during last Hilary term, calling on the defendant to show cause why a writ of *certiorari* which had issued to remove a conviction in a matter of appeal to the Court of General Sessions of the Peace for the County of Oxford, wherein the defendant was appellant and one Thomas Cowan respondent, and the order therefor, and the allowance thereof, and all proceedings had thereunder, should not be quashed with costs; and why a writ of *procedendo* should not issue, etc., on the ground, among others mentioned in the rule, that the order for the *certiorari* was granted *ex parte*, and in the first instance without cause shown, and that the writ was ordered to issue improvidently, it not being shown to the presiding judge in chambers that notice of such application was given to the chairman of the Court of Quarter Sessions and his associates.

It appeared that the defendant was convicted in August last before three of the justices of the county of Oxford of having assaulted one Cowan, a Division Court bailiff, while in the discharge of his duty, and sentenced to a fine of \$12 and \$6·86 costs; that the defendant appealed to the then next Court of Quarter Sessions against such conviction; that the appeal was heard and tried in September last at the sessions, and the conviction affirmed, and the defendant ordered to pay the costs of the appeal.

On the 15th of November last the defendant applied for and obtained a writ of *certiorari*, addressed to the chairman of the Quarter Sessions, commanding him to send to this court a certain conviction found and pending in the Court of General Quarter Sessions, etc., in a certain matter of appeal between the defendant appellant and Cowan respondent, and all things touching the same. On the 20th of

November the chairman returned in obedience to the writ the conviction and the order of the Court of Quarter Sessions, confirming the conviction and ordering the defendant to pay the costs and charges of the appeal. The caption stated the order to have been made by the chairman and James Kintrea and Wm. Gray, justices. It appeared also that on the *ex parte* application for the *certiorari* the only notices filed by the defendant were notices served on the convicting justices, Messrs. Freeman, Landon, and Muma, and that no notice was served on the chairman of the Quarter Sessions, or any two of the presiding justices before whom the appeal was tried and the conviction confirmed.

In Michaelmas term last *Robert A. Harrison* obtained a rule (on reading the *certiorari* and the return thereto, etc.), calling on the convicting magistrates and Cowan, the complainant, to show cause why the *certiorari* should not be quashed on various grounds, and why the order of the Court of General Quarter Sessions, affirming the conviction with costs, should not be quashed on grounds also mentioned in the rule.

Both rules came on for argument together, *Boyd* supporting his own rule, and showing cause against *Mr. Harrison's*, and the latter showing cause against *Mr. Boyd's* rule, and supporting his own.

Boyd, in support of the objection for want of notice, cited *The Queen v. Inhabitants of Cartworth*, 5 Q. B. 201; *The Queen v. Inhabitants of Gilberdike*, Ib. 207; *Rex v. Rattislaw*, 5 Dowl. 539; *The Queen v. Inhabitants of Darton*, 14 L. J. M. C. 41; *Rex v. Justices of Newcastle*, Dra. Rep. 121; *Victoria Plank Road Co. v. Simmons*, 15 U. C. R. 303; *The Queen v. Watson*, 7 C. P. 495; *Regina v. Peterman*, 23 U. C. R. 516.

MORRISON, J., delivered the judgment of the court.

Several objections were taken and argued on both rules, but the only one necessary for our decision is whether the notices required by the 13 Geo. II. ch. 18, sec. 5, of the intended application for the *certiorari* ought to have been

given to the justices by and before whom the order of Sessions was made.

We are of opinion that such notices were necessary. The 5th section of the statute enacts that no writ of *certiorari* shall thenceforth be granted, issued forth, or allowed, to remove any conviction, order, etc., made by or before any justice or justices of the peace or the General Quarter Sessions, etc., unless it be duly proved upon oath that the party suing out the same hath given six days' notice thereof in writing to the justice or justices, or any two of them (if so many there be), by and before whom such conviction, etc., shall be so made, to the end that such justice, or the parties therein concerned, may show cause against the issuing or granting the said *certiorari*. Here the *certiorari* granted was to remove a conviction and an order of the Sessions confirming the conviction, with a view of having both of them quashed. No notice of such application was served on the justices or any two of them, by and before whom the order of Sessions was made. It is settled by many decisions upon the language of the statute, as well as from the reason of the thing, that in cases like this the justices actually present when the order of Sessions was made should be called upon to consider whether or not they would oppose the issuing of a *certiorari*, or, to use the words of the statute, to the end that they or the parties therein concerned may show cause against the granting of the *certiorari*; and it has been held that where a rule *nisi* for a *certiorari* has first been taken out and served on the justices, and a rule absolute obtained for issuing the writ, that such a proceeding is not notice to the justices, and in such a case the court have quashed the *certiorari* upon motion to do so (*Rex v. Nicholls*, 5 T. R. 281, *n*; *Rex v. Rattislaw*, 5 Dowl. P. C. 539).

This court, in *The Queen v. Peterman* (23 U. C. R. 516), the converse of this case, where it appeared that notices were only given to the justices presiding at the Sessions who confirmed the conviction, discharged the rule to quash the conviction and the order of Sessions, because no notice of the application had been given to the convicting magistrates.

At first we thought it was not competent to the respondent in the appeal to object to the want of notices to the justices of the Sessions; but in the case of *Rex v. Rattislaw* above cited that point was before the court, and *Patteson, J.*, said, in giving judgment: "I cannot tell but that they, the justices, may be injured, and may have wished to support their own order. However, the objection being brought under the notice of the court, I am bound to deal with it."

In *Rex v. Wakefield* (1 Burr. 488) *Lord Mansfield* held that if the *certiorari* issued improvidently, though the return was filed, it would be superseded and the return taken off the file. In *Corner's Crown Practice*, p. 58, it is said that if the *certiorari* has been obtained by misrepresentation, or was issued illegally or improvidently, the court may set it aside. So, in *Paley on Convictions*, p. 374: "If, upon examination, it appears that the *certiorari* issued improperly it may be superseded, even after the return has been filed, and the return may be taken off the file."

We are, therefore, of opinion that the objection of want of notice must prevail, and as a consequence the rule obtained by *Mr. Harrison* to quash the *certiorari* and the order of Sessions will be discharged with costs.

Discharged with costs.

THE QUEEN v. STEWART.

C. S. U. C. ch. 123—Form of order and judgment.

The form of order given in the schedule to *Consol. Stat. U. C.*, ch. 123 (respecting the costs of distress for rents and penalties not exceeding \$80), states the unlawful charges to have been taken from the complainant, "under a distress for (*as the case may be*)."
Held, sufficient to say "a distress for rent," and that it was unnecessary to state such rent to have been under \$80 in order to show jurisdiction.

Robert A. Harrison obtained a rule *nisi*, which was drawn up on reading the writ of *certiorari* issued herein, and the return thereto, and the two several orders and judgments thereto annexed, calling upon the complainant and the two justices to show cause why the said orders and judgments should not be quashed, upon grounds mentioned in the

rule, among others, that the orders, etc., do not on the face of them show jurisdiction; in this, that it is not shown that the rent distrained for did not exceed \$80; that the said orders, etc., do not on the face of them comply with the form given in the statute in that behalf.

The orders returned and annexed to the writ of *certiorari* were as follows :—

PROVINCE OF CANADA, } In the matter of complaint of
UNITED COUNTIES OF } John Doel against John Stewart,
LANARK & RENFREW. } for the breach of the provisions
of the Consolidated Statutes for Upper Canada, entitled an
Act respecting the costs of serving distresses for small rents
and penalties; We, Robert R. Smith and Andrew W. Bell,
two of Her Majesty's justices of the peace for the United
Counties of Lanark and Renfrew, do order and adjudge that
the said John Stewart shall pay to John Doel the sum of
twenty-one dollars and fifty-four cents, as compensation and
satisfaction for unlawful charges and costs levied and taken
from the said John Doel under a distress for rent, and the
further sum of twelve dollars and sixty-five cents for costs
in this complaint. Given under our hands and seals this
27th day of May 1865. To which was appended the
signatures and seals of the two justices.

The second order was in the same words, only differing in amounts.

Richards, Q.C., showed cause.

Robert A. Harrison supported the rule.

MORRISON, J., delivered the judgment of the court.

We are of opinion that this rule should be discharged.

The only question for our decision is, whether the orders on the face of them are valid, and in pursuance of the statute. They correspond verbatim with the form given by the Act, Consol. Stat. U. C., ch. 123, and which form, by the 10th section, it is imperative in the justices to follow; but it is objected that the particulars of the offence are not set out after the words "distress for;" that the order does not show that the distress was for a sum within the statute, or for not more than \$80; and it was argued that the words ("as the case may be") pointed to those particulars being

inserted. We cannot take that view of the case, or come to the conclusion that such was the intention of the legislature.

The statute begins with enacting, in the 1st section, that no person making any distress for rent, or for any penalty, when the sum demanded and due does not exceed \$80, in respect of such rent or penalty, etc., shall take from any person, etc., any other costs than such as are set forth in the schedule to the Act; and by the 2nd section, if any person offends against any of the provisions of the preceding section, etc., the offender shall be ordered and adjudged to pay to the party aggrieved treble the amount of the money unlawfully taken. And by the 10th section the orders and judgments on such complaints shall be in the form in the schedule annexed to the Act.

This statutable form begins by reciting the complaint of A. B. against the defendant for the breach of the provisions of the statute, the title of which is set out. These provisions are only applicable to distresses for rent and penalties not exceeding \$80. It then states the adjudication of the justices, and the sum awarded as compensation for unlawful charges, etc., taken from the complainant, "under a distress for (*as the case may be*)," i.e. for rent, or for a penalty, *simpliciter*.

If the legislature intended otherwise, we should find the words that are usually inserted in such forms, such as: (*here specify the offence*), or (*state shortly the offence*), or, as in the statute respecting the duties of justices in relation to summary convictions ("*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*") (Consol. Stat. C., ch. 103, schedule K). Such expressions would be clear, and would leave no doubt as to what was meant, but the use of the words "*(as the case may be)*" direct in our judgment the insertion of the mere words specifying the kind of distress—rent or penalty. The object of the legislature was to have a simple, short, and concise form, and it would be hard indeed if the justices should be held to have acted illegally in following the form in the very words of the statute. If we were so to hold,

the Act itself, as said by *Baron Parke* in a like case, would form only a snare to entrap persons.

During the argument it was suggested that it was contrary to all precedent, and that the legislature never could have intended that the order should not show on its face that the justices had jurisdiction, by stating that the rent did not exceed \$80; but on looking at the English Act 57 Geo. III. ch. 93, from which our Act was taken (our legislature including within its provisions distresses for penalties), we find the very same form given word for word; and as that Act only referred to distresses for rent, the form is identical with the order made by the justices in this case.

We are therefore of opinion that the objections taken to these orders are unfounded, and that the rule should be discharged.

Rule discharged.

YOUNG ET AL. *v.* JAMES ELLIOTT AND ROBERT S. MISENER.

Statute of Limitations—Possession.

Where a person having in fact no title has occupied part of a lot of land for twenty years, and other parts for a less period, he is entitled only to the first-mentioned portion as against the true owner, and it can make no difference that he acted under a belief of title honestly entertained.

EJECTMENT, for lot 10 in the first concession of Crowland.

Two verdicts having been found for the defendants, and set aside by the court, the case was a third time tried at Hamilton before *Draper, C.J.*, and the same verdict again rendered.

Burton, Q.C., obtained a rule *nisi* for a new trial on the grounds that the verdict was contrary to evidence, in this, that the evidence showed title in the plaintiffs, and no evidence was produced to displace the title of the plaintiffs or their right of possession under such title.

And for misdirection in this, that the jury were told in effect that if Jeremiah Misener entered upon the land more

than twenty years before the commencement of this suit, with the intention of taking possession of the whole lot, and in the *bond fide* belief that he was entitled to the land, then title would be acquired by the defendants, who claimed under him, to all the lands in their possession at the time of the commencement of this action, whereas they should on this particular point have been directed that the defendants were only entitled to such part of the lot as was proved to have been in the actual possession of Jeremiah Misener, or those claiming under him, continuously for more than twenty years before action; and that notwithstanding the supposed claim of the said Jeremiah Misener under the will of Leonard Misener, the defendants were confined to such lands as were shown to have been in such actual possession for more than twenty years.

Robert A. Harrison showed cause, and cited *Young et al. v. Elliott et al.*, 23 U. C. R. 424; *Doe Harris v. Benson*, 3 U. C. R. 164; *Hunter v. Corbett*, 7 U. C. R. 75; *Wight v. Moody*, 6 C. P. 502, 506; *Doe Hill v. Gander*, 1 U. C. R. 3; *Doe Beckett v. Nightingale*, 5 U. C. R. 518; *Doe Taylor v. Sexton*, 8 U. C. R. 264; *Ferrier v. Moodie*, 12 U. C. R. 379; *Martin v. Weld*, 19 U. C. R. 631; *Jackson dem. Preston v. Smith*, 13 Johns. 406; *Proprietors of the Kennebeck Purchase v. Springer*, 4 Mass. 416; *Bogardus v. Trinity Church*, 4 Paige, 178; *Royer v. Benlow*, 10 Serg. & R. 306; *Burns v. Swift*, 2 Serg. & Rawle, 436; *Criswell v. Altemus*, 7 Watts, 530; *Lawrence v. Hunter*, 9 Watts, 64; *Doe Dunn v. M'Lean*, 1 U. C. R. 151; *Doe M'Millan v. Brock*, 2 U. C. R. 270; *Doe Peterson v. Cronk*, 1 U. C. R. 135; *Doe Moffatt v. Scratch*, 5 U. C. R. 351; *Doe Simpson v. Molloy*, 6 U. C. R. 302; *Doe M'Gillis v. M'Gillivray*, 9 U. C. R. 9; *Doe Pettit v. Ryerson*, 9 U. C. R. 276; *Johnson v. M'Kenna*, 10 U. C. R. 520; *Butter v. Donaldson*, 12 U. C. R. 255; *Stewart v. Murphy*, 16 U. C. R. 224.

Freeman, Q.C., supported the rule, citing *Allison v. Rednor*, 14 U. C. R. 459; *Angell on Limitations*, sec. 408.

The facts of the case are sufficiently stated in the judgment of the court, delivered by

DRAPER, C.J.—I regret very much the prolonged litigation between these parties, and the more because the miscarriage in the verdict at the last trial is attributable to the incorrect direction which I gave them, and because I ought not to have accepted the finding as a verdict on the issue.

The plaintiffs' title, unless displaced by the defence, is upheld by the judgment of this court, reported 23 U. C. R. 420.

The defence rests on an asserted possession of twenty years.

It is better to recapitulate briefly the facts of the case.

Leonard Misener became seized of this lot No. 10, containing 100 acres, and of a broken lot lying in front of it containing 70 acres, by grant from the Crown in 1798. An allowance for road separated these lots.

Leonard died, leaving a will under which Jeremiah Misener claimed these 170 acres; but this court in Michaelmas term 1864 determined that he took nothing under that devise, he being the illegitimate son of Leonard's daughter, and this land descended to Peter, the eldest son of Leonard and his heir-at-law. Peter died, leaving a will dated 23rd October 1838, by which he devised this hundred acres, with other lands, to the plaintiffs in trust. Peter left a son named Peter, him surviving.

Jeremiah at first, and for a long period, claimed under the will of his grandfather Leonard.

At the trial Jeremiah was a witness for the defendants, and swore in round terms that he went into possession of the 170 acres, being put in possession by his uncle Peter and the executors of his grandfather, as he supposed under the will; that about twenty years after Leonard's death Peter made a deed to him (Jeremiah) of the broken lot, 70 acres, and that he settled thereon; that in 1838 or 1839 he made a small clearing, or rather chopping, on the lot now in question for a building spot, but did not fence it;

and that in 1843 he cleared about five acres of the same lot, which was fenced, though according to other testimony the defendant Elliott made this clearing upon some bargain with Jeremiah, and put up the fence in the spring of 1843. This clearing was along the line between the 1st and 2nd concessions, beginning about the centre of the lot and going towards the S.E. angle of it. Jeremiah also stated that he took timber whenever he wanted it off this lot, and about 1836 or 1837 sold timber growing on it. On the 15th of August 1845 he made a deed purporting to convey ten acres of the south half of the lot to the defendant Elliott. On the 21st of December 1849 he made another deed, purporting to convey ten acres more of the south half to the defendant Elliott, and on the 13th of April 1857 he made a third deed, purporting to convey the remaining thirty acres of the south half to the defendant Elliott. On the 11th of October 1854 he made a deed purporting to convey the north fifty acres of this lot to the defendant Misener.

There was evidence to confirm Jeremiah's statement as to these clearings and the times when they were respectively made, and there was also evidence on the other side showing that there was no clearing or fencing on this lot before 1845, though there was a small piece chopped in 1843 which was neither cleared nor fenced. At that time Jeremiah lived on the broken lot in front of this.

I told the jury that the defendants must show that the plaintiffs were actually dispossessed for twenty years before the 30th of September 1863, the date of the ejectment summons in this cause; and that as it appeared that neither the grantee of the Crown nor his heirs or assigns had taken actual possession of this lot, the defendants must further show that Peter (the son of Leonard) in his lifetime, or that the plaintiffs, his devisees, after his death, had notice twenty years before the commencement of this suit that Jeremiah, or some or one of the defendants, was in the actual possession thereof. It was not pretended that any one else had ever been in possession.

I told them also that a series of independent acts of tres-

pass, each of them unconnected with the preceding or subsequent acts of trespass, would not in law amount to a possession; that the owner, by virtue of his title, was in possession in the eye of the law, though the land was in fact unoccupied, and that a wrongdoer who entered upon the land must show dispossession of the true owner by visible and continuous possession for twenty years in himself and those under whom he claims; that such possession must extend over the whole of the land defended for, because such possession of a portion of a large lot could not by construction of law be deemed possession of the whole lot; that possession was a matter of fact for their determination.

After a considerable absence the jury came into court, and inquired whether, assuming that Jeremiah was in possession of a part of the land twenty years before the action and extended that possession afterwards, he should hold all he thus became possessed of, though of a part he had been in possession for less than twenty years. I answered that if he entered upon a wild lot, claiming to own the whole of it, though only reducing a part of it to actual possession, and held what he first occupied for twenty years or upwards, and the residue for less, he would be entitled to hold all that he actually occupied before action brought, subject to the qualification, that as this was a wild lot when he took possession, notice to the owner of his having entered upon it was indispensable, as already explained.

The defendants' counsel excepted to this part of my charge.

The jury after further deliberation returned a verdict for the plaintiffs for the whole lot, excepting such parts of it as on the 30th of September 1863 were in the actual possession of the defendants, or either of them.

We have no doubt the rule must be made absolute. Jeremiah had no right or title to this lot at any time. Whenever he entered he was a trespasser, and it would have been no answer to an action either of trespass or ejectment that he supposed he had a title under Leonard Misener's will. Nor can it alter the character of successive acts of trespass that they were all committed under the assumption of the

same title. His belief that he had a right, however honestly entertained, if ill founded in point of law, cannot diminish or destroy the legal claims of others, or deprive them of their right to treat him as a wrongdoer in taking possession of their land. The misdirection on this point has caused the jury to return a verdict which cannot therefore be upheld.

On reviewing the evidence given at the trial, it now appears to me that the part of it which relates to certain acts and statements of Peter, the grandson of Leonard, was wholly immaterial. This lot never vested in him under his father's will, but in the plaintiffs, and he could not bind them by his acts or declarations, or invalidate the title which the will gave them.

There must be a new trial without costs.

Rule absolute.

THE COMMERCIAL BANK OF CANADA v. THE GREAT WESTERN RAILWAY COMPANY.

Inspection and discovery of documents—Trial at bar.

When a judge in Chambers has ordered the inspection and discovery of documents, the court will not interfere unless it appears that such order has not been made "with due discretion, with reference to the facts before him;" and in this case they refused to interfere.

The plaintiffs sued defendants upon a banking account, kept, as they alleged, upon the credit of the defendants, while the defendants asserted that it was upon the credit either of the Detroit and Milwaukee R. W. Co., for whose benefit the money went, or on the credit of Messrs. B. & R., two of the defendants' directors, who acted also for that company.

Inspection and discovery was granted to the plaintiffs—1. Of a statement or report of transactions between defendants and the D. & M. Co., made by accountants for a committee appointed by the defendants. 2. Of letters written by Messrs. B. & R. to the chairman or secretary of the defendants' company respecting such transactions, and referred to in such report. 3. Of all letters in the defendants' custody, written or received before the controversy leading to this suit by Messrs. B. & R., as the defendants' managing and financial directors, to or from the defendants' chairman, and all the defendants' books of account, relating to the matters in question.

The defendants were also allowed inspection and discovery of letters written by the plaintiffs' cashier to a bank in New York, explaining the plaintiffs' position with the defendants, and on the subject of notes of the Detroit and Milwaukee Railway Co.

The court, under the circumstances of this case, refused to order a trial at bar.

THERE were four applications in this suit, three relating to the inspection and discovery of documents on the part of

both the plaintiffs and defendants, and one for a trial at bar made by the defendants.

The nature of the action and the facts, so far as they are material to these applications, are sufficiently stated in the following report, and will be found more fully set out in the reports of this case on the motion for new trial in this court, 22 U. C. R. 233; in the Court of Error and Appeal, on appeal from that decision, 2 Error and App. Rep. U. C. 285; and in the Privy Council on appeal from the last-mentioned judgment, 13 L. T. Rep. N. S. 105.

On the 24th of October 1865 *Mr. Justice Adam Wilson*, after hearing the parties upon summons, made an order in Chambers, that the plaintiffs should be at liberty to inspect and take copies of the following documents, namely: 1. The statement of the accounts of Messrs. Coleman, Turquand, Youngs, and Company, relating to the dealings and transactions between the defendants and the Detroit and Milwaukee Railway Company, and prepared by said accountants for the committee of investigation appointed by resolution of defendants' company on the 4th day of April 1860, and referred to in the report of the said committee.

2. Also the letters dated respectively the 28th of December 1857 and the 12th of January 1858, and written by Messrs. Brydges and Reynolds, or one of them, to the chairman and secretary of the defendants' company, or either of them, also referred to in the said report, and respecting dealings and transactions between the defendants, or their directors or agents, and the Detroit and Milwaukee Railway Company.

3. Also all letters written or received before the commencement of this suit, or the controversy or dispute between the plaintiffs and the defendants leading to this suit, by the said Brydges and Reynolds, or either of them, in their respective capacities of managing and financial directors of the defendants' company, to or from the chairman and secretary of the defendants, relating to the matters in question in this cause, and which are in the custody, possession, or control of the defendants, their officers or agents; and that the defendants, by their proper

officer in that behalf, do answer on affidavit,⁷ stating what letters of the character and description aforesaid the defendants have in their custody, possession, or control.

4. Also all books of account of the defendants relating to the matters in question in this cause, and that the defendants do, by the affidavit of their proper officer in that behalf, discover on oath all books of account in his custody, possession, or control, in anywise relating to the aforesaid matters.

The order provided for time and place of production.

On moving for this summons an affidavit was filed by the agent of the plaintiffs' attorney, in which, after setting out the nature of and proceedings in the action, it was stated—

16. From documents printed and published by the company or its directors and agents, and especially from the report of the committee of investigation appointed at a meeting of the shareholders of the defendants company on the 4th day of April 1860, it appears that certain accountants, namely, Messrs. Coleman, Turquand, Youngs, and Company, were directed to investigate the financial affairs of the said company, and amongst others those connected with the Detroit and Milwaukee Railway, in which are involved the matters in question in this cause; and these accountants, after investigation of the books and papers of the said company, presented to said committee a full statement "respecting the dealings and transactions between the Great Western Directors and the Detroit and Milwaukee Railway Company."

17. It further appears from documents produced by defendants, and in evidence at the former trial of this cause, that on the 28th of December 1858 Brydges and Reynolds wrote to the chairman or secretary of defendants' company in London, England, and therein set forth certain matters connected with their proposed operations on the Detroit and Milwaukee Railway, which received the assent of the defendants' board, resident in England; and it also appears that Brydges and Reynolds, in their respective capacities of managing and financial directors of the defendants' company, wrote and received divers other letters to and from

the chairman and secretary of the defendants relating to the matters in question in this cause, and which letters are now, as I believe, on file and in the custody of the defendants.

18. That the accountants aforesaid, in prosecuting the inquiry aforesaid, examined into various books of account and other records of the defendants, which books and records contain entries and statements relating to the account sued for and to the matters in question in this cause.

19. It is advisable and necessary that the plaintiffs should inspect and be prepared to prove on their behalf at the trial of this cause the matters contained and appearing in said statement of the accounts aforesaid, and in the said letters, books of account, and records aforesaid.

20. I believe that besides said statements, letters, and books of account there are various other documents and papers in the custody of the defendants which contain matters in relation to the questions in issue in this cause, and that it is material and necessary for the plaintiffs, in order to support their claims on the trial of this cause, and to prepare for such trial, to have such documents and papers, as well as the statement of the accountants, letters, books of account, and records aforesaid, produced for the inspection of the plaintiffs, their attorney or agent, and that the plaintiffs will derive material advantage and support in their case from the production of all the aforesaid documents.

During Michaelmas term last *Irving, Q.C.*, obtained a rule *nisi* in the Practice Court, returnable in full court, to show cause why the defendants should not be at liberty to inspect and take copies of the following letters:—

1. A letter written on or about the 7th or 8th of January 1858 by Charles S. Ross, cashier of the plaintiffs' bank, to Augustus E. Silliman, president of the Merchants' Bank, New York, being the letter to which the said Charles S. Ross refers in a letter written to Messrs. Brydges and Reynolds of the 13th of January 1858, as explaining the position of the plaintiffs with the defendants.

2. The letters or copies of letters which were written by the said Charles S. Ross, or the head officer of the plaintiffs,

during the months of January, February, and March 1860, or near that time, to Augustus E. Silliman or Jacob D. Vermilye, or other head officer of the Merchants' Bank at New York, on the subject of the payment by the said Merchants' Bank of certain notes of the Detroit and Milwaukee Railway Company in the month of January 1860; and why the plaintiffs, by the oath of their president, cashier, general manager, manager of their branch at Hamilton, or some or one of them, should not answer on affidavit, stating what documents the plaintiffs have in their possession or control, or in that of their attorney or agent or agents, relating to the matters in dispute in this cause, and more particularly as to those matters suggested by the affidavit of Æmilius Irving, made on the 25th of November instant, or whether the said officer or officers of the plaintiffs knows or know as to the custody they or any of them are in, and whether he objects or they object, and if so, on what grounds, to the production of such as are in his or their possession or power.

On moving this rule, Mr. Irving's affidavit was filed, as follows:—

1. That I am the attorney for the defendants in this cause.

2. That during the years 1858, 1859, and part of 1860 a certain banking corporation at the city of New York, known as the Merchants' Bank, of which Augustus E. Silliman and Jacob D. Vermilye were the head officers, the former of whom I am informed and believe was the president, and the latter I am also informed and believe was the cashier; which said bank, during the said period, was the agent or one of the agents of the plaintiffs in and about the matter of its banking business in New York aforesaid.

3. That this action is brought to recover a large sum of money, amounting to nearly one million of dollars, upon a banking account kept by the plaintiffs, and, as the plaintiffs allege, upon the credit of the defendants, but which the defendants deny; and in order to defeat this allegation of the plaintiffs, the defendants have had to produce a large amount of evidence, both oral and documentary, a portion of which is directed to show the circumstances under which the account was opened by the plaintiffs with certain persons named Brydges and Reynolds, who were at the period of the opening of the said account not only directors of the

defendants' company, but were acting also on behalf of the Detroit and Milwaukee Railway Company, for whose benefit alone, as the defendants contend, the advances on the banking account in question in this cause were made, or perhaps on the credit and account of the said Brydges and Reynolds, but at all events not on the credit or account of the defendants in this cause.

4. That in the early part of the year 1858, and just at the time when the account in question was first opened, Messrs. Brydges and Reynolds, then being in New York, and engaged in settling some of the affairs of the Detroit and Milwaukee Railway Company, delivered three promissory notes to persons named Raynor and Clarke, then being creditors of the Detroit and Milwaukee Railway Company, said notes in all amounting to about \$21,000, and made payable at the said Merchants' Bank, and they, the said Brydges and Reynolds, having arranged with the plaintiffs that they, the plaintiffs, would retire or pay at maturity the said notes at the Merchants' Bank on the credit or account of the parties about whom the difficulty is now who to charge, required the said plaintiffs to communicate with the said Merchants' Bank and satisfy the said bank of the "reputability" of the notes in question, to the end that the said Raynor and Clarke might have the said notes discounted at once; that with this request the plaintiffs, through their head officer Charles S. Ross, acceded, and then wrote to the aforesaid Augustus E. Silliman, and when informing the said Brydges and Reynolds of having done so, in a letter to them dated 13th January 1858 thus writes:—

"After receiving your telegram the other day, I wrote to Mr. Silliman explaining our position with the Great Western Railway Company, and apologizing for troubling him out of the usual course of business, etc. etc."

Which said letter referred to by the said Charles S. Ross seems to have been written to Augustus E. Silliman about the 7th or 8th of January 1858, and from correspondence in evidence in this cause it would seem that telegraph messages and letters passed between the said Ross and the said Silliman in and about this matter.

5. That at the maturity of the said notes in the last paragraph mentioned the plaintiffs paid them, or protected them, according to the banking phrase, by charging them to the account in question in this cause.

6. That the said Merchants' Bank continued the agents of the plaintiffs through 1858, 1859, and part of 1860, and were from time to time directed by the plaintiffs to take up

and pay the notes of the Detroit and Milwaukee Railway Company, which the plaintiffs charged to the account in question in this cause.

7. That towards the end of the year 1859, the Detroit and Milwaukee Railway Company becoming embarrassed, and its financial affairs disordered, the question of the responsibility for the account in this cause became matter of discussion, and during the month of January 1860 several notes of the said Detroit and Milwaukee Railway Company, amounting to about \$41,000, fell due at New York, and were paid by the Merchants' Bank on behalf of the plaintiff, but which the plaintiffs refused to recognise, on the ground that they had not given instructions for such payments, whereupon a correspondence ensued between the said Charles S. Ross, or other head officer of the bank at Kingston, and the aforesaid Augustus E. Silliman or Jacob D. Vermilye, or other officer of the Merchants' Bank, wherein the position of the plaintiffs towards the Detroit and Milwaukee Railway Company and towards the defendants in this cause was stated and explained by the aforesaid head officers of the plaintiffs, or some of them.

8. That the letters written by the said Charles S. Ross, or other head officer, to the officers of the Merchants' Bank were, as I am informed and believe, written in the months of January, February, and March 1860.

9. That I am advised and believe that it is material and necessary for the defendants, for the purpose of enabling them to establish their defence to this action, and of ascertaining the extent or amount of their liability, if any, to the plaintiffs' claim, that they should be allowed by their attorney or agent to inspect and copy such of the said letters, copies of letters, books, and documents which I have hereinbefore described without being able to identify the same minutely, produced to the defendants, their attorney or agent, and that the defendants will derive material advantage and support from the production of the same.

There was also a rule *nisi* obtained by the plaintiffs to rescind an order of *Mr. Justice Morrison*, granting inspection of certain papers to defendants; but it is unnecessary to report this application, as it will be seen by the judgment that it was not pressed.

During Michaelmas term last *Irving, Q.C.*, obtained a rule *nisi* to rescind or modify the order made by *Mr. Justice Adam Wilson*, on the grounds:—

That the plaintiffs are seeking to obtain inspection of documents of which they could not avail themselves as evidence in their favour against the defendants.

That the plaintiffs are attempting to discover and inspect confidential and privileged documents between the different branches and members of the defendants' company.

That some of the documents ordered for inspection and discovery are such as have been prepared by and after the knowledge of the differences between the plaintiffs and defendants, and are of a privileged character.

That no order can be made to require the production, inspection, or discovery of documents, books, and papers which are in the custody, control, and possession of persons in Great Britain, and without the jurisdiction of this honourable court, and not written to or by persons having any legal position of control with regard to the affairs of the defendants;—and upon grounds disclosed in the papers following, used and filed in Chambers before *Mr. Justice Adam Wilson* (specifying the papers), etc.

Crooks, Q.C., showed cause to the rules obtained by defendants, and supported the plaintiffs' rule. *Irving, Q.C.*, contra.

Har. C. L. P. A. p. 333, sec. 175; Consol. Stat. U. C. ch. 22, secs. 189, 190, 197; *Hunt v. Hewitt*, 7 Ex. 236; *Colman v. Trueman*, 3 H. & N. 871; *Woolley v. Pole*, 14 C. B. N. S. 538; *Chartered Bank of India, etc., v. Rich*, 4 B. & S. 73; *Thompson v. Robson*, 2 H. & N. 412, were cited on the argument.

In the same term *M. C. Cameron, Q.C.*, obtained a rule calling on the plaintiffs to show cause why the trial of this cause should not be had at the bar of this honourable court, on the ground of the importance, difficulty, and number of the questions of law and fact that will arise on the trial, as shown and referred to in the affidavit filed. He referred to Consol. Stat. U. C. ch. 10, secs. 21, 22, 23.

J. H. Cameron, Q.C., and *Crooks, Q.C.*, showed cause.

DRAPER, C.J., delivered the judgment of the court.

There are four applications to the court in this cause to be disposed of:—

First, An application to rescind an order made by *Mr. Justice Adam Wilson*, granting to the plaintiffs liberty to inspect and take copies of—I. A statement made up by certain accountants of transactions between the defendants and the Detroit and Milwaukee Railway Company, prepared for a committee appointed by the defendants' company by a resolution dated 4th of April 1860, and referred to in the report of that committee. II. Letters dated 28th of December 1857 and 12th January 1858, written by Messrs. Brydges and Reynolds, or one of them, to the chairman or secretary of defendants' company, also referred to in that report, and respecting dealings between the defendants and the Detroit and Milwaukee Railway Company. III. All letters written or received before the commencement of this suit or the controversy leading thereto by Brydges and Reynolds as managing and financial directors of defendants' company, to or from the chairman and secretary, relating to the matters in question in this cause, which are in the custody of the defendants or their officers, and that the defendants do answer on affidavit by their officers what letters of that character they have in their custody. IV. All books of account of defendants relating to the matters in question; and that defendants, by affidavit of their proper officer, do discover all books of account in his custody, etc., relating to the said matters. The order provided for time and place of production.

As was said in the case of *Colman v. Trueman* (3 H. & N. 877), the question is not whether the learned judge had power to make the order, "but whether he made it with due discretion with reference to the facts before him." In the same case the Lord Chief Baron, after pointing out the rule as to confidential correspondence, makes some observations not inapplicable to this case: "Certainly the correspondence amongst the parties themselves, or between them and their agent, has been ordered to be produced; and if there was no authority for it I should be so disposed to act. In my

opinion there is no reasonable ground for any distinction between such correspondence before the contract and after the alleged breach of contract."

The letters referred to in the order appear to us to bear much of the character of those pointed out by the Chief Baron—letters forming a correspondence between the managing and financial directors in this province and the chairman and secretary in England, analogous to "correspondence among the parties themselves."

Much of the doubt which I felt at the argument upon this rule has been removed after hearing the other applications, and on carefully perusing the affidavit on which the motion for a trial at bar was grounded; and at all events we are not prepared to hold that the learned judge exercised an improper discretion in making the order in question.

[See *Ingilby v. Shafto*, 9 Jur. N. S. 1141; *Scott v. Walker*, 2 E. & B. 555; *Smith v. Duke of Beaufort*, 1 Phillips, 209.]

Second, A rule *nisi* from the Practice Court, made returnable here, to inspect and take copies of a letter written about the 7th or 8th of January 1858 by Charles S. Ross, cashier of the plaintiffs' bank, to Augustus E. Silliman, president of the Merchants' Bank, New York, being the letter to which the said Charles S. Ross refers in a letter written to Messrs. Brydges and Reynolds of the 13th of January 1858, as explaining the position of the plaintiffs with the defendants. Also letters, or copies thereof, written by said Ross or other head officer of the plaintiffs during January, February, or March 1860, or near that time, to the said Silliman or Jacob D. Vermilye, or other head officer of the Merchants' Bank at New York, on the subject of the payment by the Merchants' Bank of certain notes of the Detroit and Milwaukee Railway Company in January 1860; and for discovery of documents, especially as to matters referred to in affidavit filed.

We think the rule should be made absolute for the inspection of the letters, correspondence, and documents referred to in the 4th, 6th, and 8th paragraphs of the affidavit on which the rule *nisi* was granted. We do not very well see on what grounds this could be refused to the defendants,

after upholding the order above-mentioned in favour of the plaintiffs.

Third, A rule *nisi* obtained in the Practice Court and made returnable here, to rescind an order of my brother *Morrison* made on the 24th of November last, granting inspection of certain letters, etc., therein mentioned to the defendants. This rule was not, however, pressed by the plaintiffs' counsel, provided the court sustained the order for inspection which the plaintiffs had obtained, and which, in our opinion, should not be interfered with. We consider, therefore, that this rule should be discharged.

Fourth, There is a rule obtained by the defendants' counsel to show cause why there should not be a trial at bar.

This action was commenced in March 1862, and was tried and a verdict returned for the plaintiffs in May of that year. A new trial was moved for and was refused, against which refusal the defendants appealed, and the Court of Error and Appeal reversed the decision and granted a new trial. The plaintiffs in their turn appealed to the Queen in Council, but their appeal was dismissed. Since then an additional plea has been put upon the record, and now, after nearly four years of costly litigation, the cause is only at issue. Besides the various proceedings above stated, a reference to an arbitrator was made at the former trial to determine the amount to which the plaintiffs were entitled, which was proceeded with and an award made, and this court (since I became a member of it) heard a lengthened argument on a special case stated by the arbitrator, and on a rule to set aside the award.

The grounds on which the present application is rested are set forth on affidavit, containing a general statement of the nature and character of the plaintiffs' claim and of the transactions out of which it arises. It is then alleged that the following, among other questions of difficulty, will arise—whether the defendants are liable at all; whether for the whole or a part of the plaintiffs' claim; whether, if the defendants are only liable to the extent of the loan authorized by them to the Detroit and Milwaukee Company, amounting to \$1,250,000, how much of that liability has

been removed by payment made otherwise than directly to the plaintiffs; whether, if Brydges and Reynolds had any authority to bind defendants, it was joint or separate, and whether payments made by plaintiffs on the direction of Reynolds alone or of Brydges and Reynolds would bind defendants; whether payments of coupons of the Detroit and Milwaukee Company, presented at the counter of the plaintiffs, would be money lent or paid to the use of defendants; and various other questions which, owing to the manner in which the case was left to the jury on the previous trial, were not so presented as to obtain a direction of the judge thereon; and also questions as to the admissibility of oral and documentary evidence.

Taking these questions as they are stated, they (with one exception) suggest very little, if anything, which was not presented at the first trial, or which has not been argued either in this court or the Court of Error and Appeal; and when to this is added the proceeding before the Judicial Committee of the Privy Council, it is surely not too much to hope that at a second trial there will not be raised many *new* and at the same time difficult questions. In the judgment in the Privy Council only one matter is pointed out which was omitted to be left to the jury, namely, the right of the plaintiffs to claim in respect of the dealings beyond the £250,000.

Upon this, so far as the evidence which may be given raises a question of law, the presiding judge will have to direct the jury. Very probably every question that can be raised on one side to embarrass or confuse the other will be raised, inasmuch as this seems to be a combat *à l'outrance*, not so much, perhaps, between the two corporations as between the parties who have conducted the various dealings which have resulted in this litigation. But excepting the unusually large amount of the transactions, taken in reference to cases commonly before our tribunals, the action is of a well-known character, and no questions have arisen as yet to which well-settled principles are not applicable, though complications of fact may create difficulty in the application.

We ought not, therefore, to accede to this application if it is at all likely to lead to inconvenience not counterbalanced by the probable advantage. I cannot speak from experience, for since I have known the courts in this province, upwards of forty years, there has not been a trial at bar; but I incline to think that the presence of three judges will not shorten the trial, or cause the decision of those objections which arise upon evidence at *Nisi Prius* to occupy less time than when only one presides. The proceedings at the trial are open to review by the same court sitting in banc as in ordinary trials, and neither party when an inquiry was made during the argument evinced the slightest intention of waiving his right, or of adopting a course at the trial which would enable them to go up at once to the Court of Error. The first trial, if I am rightly informed, occupied three days. There seems to be a probability that more rather than less evidence will be tendered. The question then arises, When could all the three judges of this court find sufficient time to try this cause? and I confess I do not see that until after the 1st of July next we could be certain to have a sufficient number of consecutive unoccupied days, and then only by giving up so much of the so-called vacation which we have. I would not begin the trial at the risk of being obliged either to adjourn it over for some time in order to complete it, or of having to suffer other duties to go unperformed, to the prejudice of other suitors.

On the whole, and as a matter of general discretion, we are of opinion this rule should be discharged.

Rule discharged.

JOHNSON v. HUNTER.

Survey—Township of Smith—Lots fronting on a river—C. S. U. C. ch. 93, sec. 27.

The three easterly lots only of one concession in a township (Smith, in the county of Peterborough) were bounded in front by a river, and the line had been run in the original survey in front of such concession up to though not past these lots, but the township itself fronted upon another township.

Held, clearly not a township bounded in front by a river, within the C. S. U. C. ch. 93, sec. 27, so that resort might be had to the posts in the concession in rear to determine the side lines of these three lots.

Quære, whether such a case is provided for by the statute.

EJECTMENT for a part of the west half of lot number twenty-five, in the fifth concession of the township of Smith, described specially by metes and bounds. The defendant limited his defence to a part of the land mentioned in the writ, describing that part specially by metes and bounds.

The trial took place at Peterborough, in October 1865, before *Draper, C.J.*

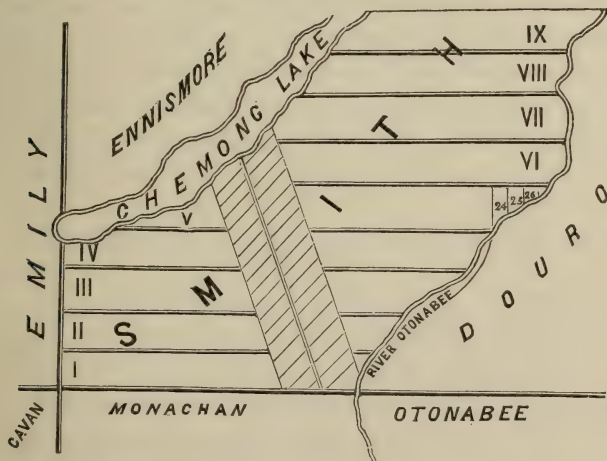
Neither party disputed the title of the other. The dispute was wholly a question of survey. The plaintiff insisted that the township of Smith came within the definition contained in the 27th section of the Act respecting the survey of lands in Upper Canada (Consol. Stat. U. C. ch. 93), which provides that in those townships which are bounded in front by a river or lake, where no posts or other boundaries were planted in the original survey on the bank of such river or lake to regulate the width in front of the lots in the broken front concessions, the side lines of lots in such concessions shall be drawn from the posts or other boundaries on the concession line in rear thereof parallel to the governing line.

It appeared that the first concession of the township of Smith was bounded in front by the township of North Monaghan, and on the west until it intersected the waters of Chemong Lake by the township of Emily. The lots numbered from the west, and the concessions throughout from the front on the township of Monaghan.

According to the map certified from the office of the Commissioner of Crown Lands, the line of the front of the

first concession was projected to the river Otonabee, and there were eleven full lots laid out, and a lot No. 12, which was not a full lot. This lot meets the lots laid out one on each side of a road which was laid out in a north-westerly direction from the front of the concession to Lake Chemong, which this road and range of lots on each side intersects in the sixth and seventh concessions of the township of Smith. From the point where the first concession line strikes the river Otonabee, the township of Smith is bounded by that river, or a lake through which it flows, on its easternmost side, and on the north and on the west this township was also bounded by a continuation of small lakes till the point was reached on the third or perhaps fourth concession where it abutted upon the township of Emily. Such was its configuration according to this plan.

The township was most irregular in figure. Eighteen concessions were marked, though the eighteenth had only nine broken lots. In the fifteenth concession the easternmost lot was numbered 47, while Nos. 20 and 21, both broken lots, are the extreme lots on the west. The following sketch will convey a general idea of the plan.



It appeared that all the lots laid out in the first concession front on the township of Monaghan, not on the river Otonabee; that from the front of the first concession back to the

sixteenth, the last concession which contained any lots bounded to the east by the waters of the river, there was a varying number of lots; in some concessions one or two, in the fifth concession, the one in question, four, and in the twelfth concession five lots, which were broken by the river; and that from the north-east corner of the township the course of the river was south-westerly.

From the record and the plan put in by the plaintiff, it seemed that the course of the concessions, running from the west side of the township, was north seventy-four degrees east.

The parties at the trial asked for the ruling of the learned judge, whether on these facts this was a township coming within the 27th section above cited; and on his ruling that it was not, a verdict was rendered for the defendant, with leave to the plaintiff to move to set it aside and to enter one for himself.

In Michaelmas term *C. S. Patterson* obtained a rule on the defendants to show cause why there should not be a new trial, the verdict being contrary to law and evidence, because the township of Smith in that part in question was a township bounded in front by a river, and the line in question should have been run from the posts in front of the concession in rear of the concession in question; and for misdirection, in ruling that the said mode of ruling did not apply to the land in question. He did not move on the leave reserved.

J. H. Cameron, Q.C., showed cause during this term.

DRAPER, C.J., delivered the judgment of the court.

In the fifth concession of this township it appears by the plan that lots Nos. 24, 25, 26, and 27 are broken lots in front. The river Otonabee does not encroach upon another lot in that concession; No. 24 is not a broken lot along its whole front, the south-west angle being untouched. The river goes across the whole front of the other three lots, No. 27 apparently not being the eighth part of a full lot. On No. 24 a post may have been planted

at the south-west, which is the governing angle, but no post could have been planted on the other three lots on the line of the front of the fifth concession. *Mr. Patterson* contends that these three lots come within the spirit and meaning of the 27th section; and that, as they are bounded in front by a river, where no posts were planted in the original survey on the bank to regulate the width in front, resort must be had to the posts in front of the sixth concession; and as it appears by the plan put in for the plaintiff that the south-east corners of Nos. 24 and 25, or possibly the south-west corners of Nos. 25 and 26 in the sixth concession, were known, that the side lines in the corresponding lots in the fifth concession should be produced from those posts.

His argument must be carried to the length that the words "when the line in front of any such concession was not run in the original survey" must be interpreted, "when the line in front of any part of any such concession was not run," etc., then resort is to be had to the concession in rear.

It is to be observed, in the first place, that the section 27 begins, "In those *townships* in Upper Canada which are bounded *in front* by a river or lake," etc. It then speaks of the absence of any posts to regulate the width in front of lots "in the broken front concessions," and then the words above quoted, "when the line in front of any *such* concession was not run," etc., are used; the whole matter contemplated by the statute being governed and limited by the introductory words, "In those townships which are bounded in front by a river or lake."

We do not think the legislature had, in passing this section, in their contemplation a township of so irregular and exceptional a shape as that of the township of Smith. Nor do we think it possible to hold that this is a township bounded in front by a river or lake, or that it is the case of a concession of which the line in front was not run in the original survey; for the line *in front* of this concession appears to have been run from its western extremity until beyond the south-west angle of No. 24, perhaps half way across the front of that lot.

It may be that this particular case does not fall precisely

within any of the provisions of the Survey Act. Whether that is so or not we are not called upon to decide. The plaintiff's case depends upon his showing that he can run side lines in the fifth concession according to posts and monuments in the sixth. The general law is clearly against him on this point, and we are all of opinion he has not brought himself within the exception.

The rule will therefore be discharged.

Rule discharged.

BANK OF MONTREAL *v.* REYNOLDS AND SPROWL.

Consol. Stat. C. ch. 58—Banks—Usury—Note payable at another place.

Under *Consol. Stat. C. ch. 58*, if the authorities of a bank, being aware that a note would otherwise be made payable where it is offered for discount, procure it to be made payable elsewhere solely for the purpose of obtaining the rate allowed by *sec. 5* for the expenses of collection, in addition to the seven per cent. interest, the transaction is usurious and void. They are not called upon, however, to inquire as to the reason for making a note thus payable when the parties themselves have so chosen to draw it.

Evidence of a general agreement with the bank that all notes made by defendants should be drawn payable in that form is admissible to support a plea of such an agreement as to the note sued on.

The maker and indorser of a note sued together are admissible witnesses for each other, though they have joined in pleading.

Remarks as to the practice in this country of taking notes for discount, not from the last indorser, but from the maker, who brings them indorsed, thus suggesting not a business transaction, but accommodation indorsements.

DECLARATION, upon a promissory note made by defendant Reynolds on the 30th of January 1865, payable to defendant Sprowl, or order, at the Bank of Montreal in Toronto, three months after date, for \$400, and by defendant Sprowl indorsed to the plaintiffs.

Plea, by both defendants, that the plaintiffs are a banking institution, carrying on business as such in this province, and incorporated by Acts of the Parliament of this province; and that before and at the time of the corrupt and unlawful agreement hereinafter mentioned the plaintiffs had and still have an agency or branch of their bank at the town of Whitby, in the county of Ontario, where the defendants

then and still reside and carry on business; that before the making or indorsing of the promissory note in the said declaration mentioned, the defendant Nelson G. Reynolds was indebted to the plaintiffs at the office of their said branch or agency in Whitby aforesaid in a certain sum of money, to wit, the sum of \$401·83 on a promissory note made by the said Nelson G. Reynolds and indorsed by the said John S. Sprowl, then held by the plaintiffs, and which matured on or about the 25th day of January 1865. And the defendant Nelson G. Reynolds being so indebted, it was, at the instance of the plaintiffs, corruptly and against the form of the statute in such case made and provided, agreed by and between the plaintiffs and the defendant Nelson G. Reynolds, that in order to discharge the said debt of \$401·83 upon the said note hereinbefore in this plea mentioned, the plaintiffs should lend to the defendant Nelson G. Reynolds a certain sum of money, to wit, the sum of \$391·91, to be applied on account of the said debt; and that the defendant Nelson G. Reynolds should then pay the balance or remainder thereof in cash, and the plaintiffs should forbear and give day of payment of the said sum of \$391·91 from the 6th day of February 1865 until and upon a certain other time, to wit, the 3rd day of May 1865; and that for the forbearing and giving day of payment of the said sum of \$391·91 as aforesaid, the defendant Nelson G. Reynolds should give and pay to the plaintiffs a certain sum of money, to wit, the sum of \$8·09, being more than three-eighths per centum above the rate of seven dollars for the forbearing of one hundred dollars for a year, and that for securing the payment to the plaintiffs of the said sum of \$391·91, so to be lent and applied upon the said debt as aforesaid, together with the said further sum of \$8·09 on the said 3rd day of May aforesaid, the said defendant Nelson G. Reynolds should make his promissory note at Whitby aforesaid, the 30th day of January 1865, for the payment of the sum of \$400 to the order of the defendant John S. Sprowl three months after the date thereof, and that the defendant John S. Sprowl should indorse the same in blank for the accommodation of and as surety for

the said Nelson G. Reynolds, and deliver the same to the said Nelson G. Reynolds, who should deliver the same to the plaintiffs, and that the plaintiffs should discount the same for the defendant Nelson G. Reynolds at their said branch or agency at Whitby aforesaid, and apply the proceeds thereof when so discounted in reduction of the said debt of \$401·83, the defendant Nelson G. Reynolds agreeing to pay the balance of the said debt in cash as aforesaid. And it was stipulated and required by the plaintiffs as a condition of the said loan and discount, to which the said Nelson G. Reynolds was constrained to assent and did assent, that the said last-mentioned note of \$400 should be made payable at the branch of plaintiffs' said bank in the city of Toronto, but that the same should be discounted by the plaintiffs at the office of their said branch or agency in Whitby aforesaid, expressly in order that the plaintiffs might exact, retain, and take a higher rate of interest than the usual and lawful discount of seven per centum per annum, to wit, in addition thereto three-eighths per centum on the amount of the said last-mentioned note, and certain other charges, under colour and pretence of a premium or commission to defray the expenses of agency and exchange attending the collecting of the same, and so that the proceeds of the said last-mentioned note when so discounted should amount to only the said sum of \$391·91, and for no other purpose or reason whatsoever. And the defendants say that in pursuance of the said corrupt and unlawful agreement the said defendant Nelson G. Reynolds thereupon at Whitby aforesaid made his promissory note in writing, being the promissory note in the said declaration mentioned, bearing date the 30th day of January 1865, and thereby promised to pay to the order of the defendant John S. Sprowl, three months after the date thereof, at the branch Bank of Montreal in Toronto, the sum of \$400, and the said defendant John S. Sprowl, for the accommodation of and as surety for the defendant Nelson G. Reynolds as aforesaid, indorsed the said note in blank, and delivered the same so indorsed to the defendant Nelson G. Reynolds, who afterwards, to wit, on the 6th day of February 1865,

at Whitby aforesaid, delivered the same to the plaintiffs to be discounted as aforesaid; and that in further pursuance of the said corrupt and unlawful agreement the plaintiffs at their said branch or agency in Whitby aforesaid, afterwards, to wit, on the said 6th day of February 1865, discounted the said last-mentioned note to the defendant Nelson G. Reynolds for the said sum of \$391·91, as being the whole proceeds thereof, which the plaintiffs, in further pursuance of the said corrupt and unlawful agreement, then and there lent and paid over to the said Nelson G. Reynolds, by crediting and applying the same on account and in reduction of the said first-mentioned indebtedness of \$401·83; and the defendant Nelson G. Reynolds then paid the plaintiffs the balance or remainder of such debt in cash, together with subsequent interest thereon. And the defendants say that the said note in the said declaration sued on, and made at Whitby as aforesaid, was not *bonâ fide* payable at the city of Toronto aforesaid, but should have been made payable at the said town of Whitby, where all transactions in respect thereof took place, and where it was discounted as aforesaid, but that the same was made payable at Toronto aforesaid by the express stipulation of the plaintiffs as aforesaid under the said corrupt and unlawful agreement, and with the corrupt and unlawful intent and design of exacting, in addition to the said rate of discount of seven per centum per annum, the said three-eighths per centum on account of the said note and other charges, under colour of a premium or commission to pay the expenses of agency and exchange attending the collection of such note, and of thereby reserving, receiving, and taking a higher rate of interest on the said loan than the rate of seven per centum per annum. And the defendants further say that in so discounting the said note in the said declaration mentioned, the plaintiffs did exact, receive, retain, and take, in addition to the said rate of discount or interest of seven per centum per annum, a sum equal to and exceeding three-eighths per centum on the amount of such note, amounting together, to wit, to the said sum of \$8·09, and only lent and paid over as aforesaid to and for the said defendant Nelson G.

Reynolds, as the proceeds of said note so discounted at the said branch or agency of the plaintiffs at Whitby as aforesaid, the said sum \$391.91 and no more; and that the said sum of \$8.09 so agreed to be given and paid by the defendant Nelson G. Reynolds to the plaintiffs for such loan as forbearance as aforesaid, and so received by the plaintiffs, and taken and retained by them on said discount as aforesaid, exceeds the rate of seven dollars for the forbearing of one hundred dollars for a year, in contravention of the statute in such case made and provided.

The trial took place at Whitby in October 1865 before *Draper, C.J.*

The defendants began, and called the defendant Reynolds as a witness for the other defendant. It was objected that both defendants having joined in the plea, he was inadmissible notwithstanding the decision in *Moffatt v. Robertson* (19 U. C. R. 401, 1 Error and App. Rep. 459), but this objection was overruled.

He swore that both he and the other defendant resided at Whitby; that the note sued upon was a renewal of a former note dated 22nd October 1864, and one of a series of notes beginning in March 1863.

It was objected for the plaintiffs that under the form of the plea the defendants could not go behind the note in question. The learned Chief Justice ruled that they might show an agreement made before, and continued, under which the present note was given.

In 1859 he said it had been arranged between himself and the plaintiffs' agent at Whitby that he should have a standing credit at the bank, giving notes indorsed by the defendant Sprowl; and the note of March 1863 was given in pursuance of that arrangement. The note sued upon, and all the other notes, were made payable at Toronto, not for his convenience, or at his request, but because the plaintiffs' agent at Whitby required it, saying that it was a rule of the bank, and he could not make the defendant an exception, and asking the witness, "How can you expect the bank to pay dividends at eight per cent. and only get seven from you?" It was only in this way, the witness said, he

could get his notes renewed, and he paid them all by checks drawn on his account at Whitby. He objected from time to time to the expense arising from this method of drawing the notes, as he had thus to pay commission in addition to the seven per cent., but he had to agree to it or the plaintiffs would not renew.

A person in the employment of the last witness since 1859 confirmed this statement, saying that the notes were not made payable in Toronto at Mr. Reynolds' instance; that he took the note sued on to the plaintiffs' bank; that there was no new understanding with respect to it, but it was made payable in Toronto because he understood the plaintiffs would not discount it if payable in Whitby; that the defendant Reynolds kept no bank account in Toronto, and would have preferred to have the notes payable in Whitby; that the witness told the plaintiffs' agent there so, but he said it was the rule of the bank to have the notes payable elsewhere than at the place where they were discounted; and having understood that such was the rule, the witness made all the notes he took to the bank payable out of Whitby. The amount credited on the discount of this note was \$391.91, the sum of \$1.50 or three-eighths per cent. being charged in addition to the seven per cent.

The plaintiffs called no witnesses.

The learned Chief Justice directed the jury that any agreement by which a bank stipulates to receive more than seven per cent. by way of discount or interest is usurious, and the question was whether they required and insisted on getting more under some colour, or pretence, or device, by which the transaction assumed a shape apparently legal, though in reality a cloak for taking more than seven per cent.; that though there was no evidence of any agreement in relation directly to the note sued on, yet if they found an agreement proved which was intended to apply to all notes given on the defendant Reynolds' account, and that this note was made under it, they might treat such agreement as applying to it; that if this was an ordinary transaction, in which the note for the convenience or advantage, or even at the request of, the maker or indorser, was made by the defendant Rey-

nolds payable at Toronto, and taken by him to be discounted by the plaintiffs' agent, then the 5th section of the Act, Consol. Stat. C. ch. 58, legalized it, and the charge of three-eighths per cent. on this note was proper; but if the plaintiffs, as a condition of opening an account at their agency at Whitby with the defendant Reynolds, by discounting notes at Whitby drawn there and indorsed by a resident there, insisted on getting the three-eighths per cent. in addition to the seven per cent., and in order to give the transaction a legal colour, insisted the notes should be made payable at Toronto, and the defendant Reynolds agreed to this in order to get a running credit with the plaintiffs, then the plea was proved and the transaction void; and that the evidence, if fully believed, was enough to warrant a verdict for the defendants. They were reminded that the evidence of Reynolds was not applicable to his own defence, but only to that of Sprowl.

The plaintiffs' counsel objected to this charge, that if no more than seven per cent. and three-eighths per cent. had been taken, the jury should have been directed that the bank were entitled to insist that the notes should be drawn so as to afford them that.

The jury found for the defendants.

M. C. Cameron, Q.C., obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and for misdirection, and the reception of improper evidence—which said misdirection was in telling the jury that if the plaintiffs refused to discount the notes of the defendant Reynolds, unless made payable at some other place than the place of discount, in order that the plaintiffs might obtain a greater rate of interest than seven per cent. by charging a commission of one-half per cent., though allowed by law to charge and receive such one-half per cent. on notes payable for the convenience of the customer at a place other than the place of discount, and the note sued on was made payable at Toronto for the purpose of enabling the plaintiffs to obtain a greater rate of interest than seven per cent. through or under colour of such commission, and not for the convenience of the defendant Reynolds, the note sued on was

void, and the defendants were entitled to a verdict; and in not telling the jury that as the note sued on was payable at Toronto, and was presented there for payment and protested, and no greater rate of interest was reserved than seven per cent. and the commission allowed by law to be taken on notes so payable, the note was valid, and the plaintiffs entitled to recover; and in not telling the jury there was no evidence to support the plea, or to show that there was in reference to the note sued on any such corrupt agreement as that pleaded. And which said reception of improper evidence was in permitting the defendant Reynolds and the witness Nourse to speak of the agreement entered into between the defendant Reynolds and the plaintiffs in the year 1859; and in allowing the defendant Reynolds to give evidence at all for the defendant Sprowl, he having joined in the same plea as Sprowl, and was thereby proving his own defence; or why said verdict as against the defendant Reynolds should not be set aside, and a new trial had between the parties, on the several grounds aforesaid.

C. S. Patterson and *Robert A. Harrison* showed cause, citing *Whitlock v. Underwood*, 2 B. & C. 158; *Withall v. Masterman*, 2 Camp. 179; *Davis v. Hardacre*, *Ib.* 375; *Hammett v. Yea*, 1 B. & P. 144, 153, note (a); *Matthews qui tam v. Griffiths*, Pea. N. P. C. 201; *Marchant v. Dodgin*, 2 Moore & Sc. 632; *Chy. Con.*, ed. 1863, p. 613; *Moffatt v. Robertson*, 1 App. Rep. U. C. 459; *Palmer v. Baker*, 1 M. & S. 56; *Meagoe v. Simmons*, M. & M. 121; *Bradbury v. Holton*, 5 O. S. 735; *Massa v. Dauling*, Str. 1243; *Peachy v. Osbaldiston*, 7 Mod. 353; *Hamilton v. Holcomb*, 12 C. P. 38; *S. C. in Appeal*, 2 App. Rep. U. C. 230.

M. C. Cameron, Q.C., contra, cited *Fox qui tam v. Keeling*, 2 A. & E. 670; *Perring v. Tucker*, 4 C. & P. 70; *Seale v. Evans*, 7 C. & P. 593; *Tate v. Wellings*, 3 T. R. 531; *Commercial Bank v. Cameron*, 9 C. P. 378.

HAGARTY, J., delivered the judgment of the court.

We think the plaintiffs fail to show any misdirection or reception of improper evidence at the trial.

We do not see that we can narrow either the statute or

the decision of our Court of Appeal by holding that the maker and indorser cannot be examined each for the other unless they plead separately. Their joining in a defence common to both does not alter the rule as to their admissibility.

It was, we think, impossible to reject the evidence as to what took place at the bank agency respecting the making of previous notes, however slight might be the connection between them and the note sued on, if any reasonable ground existed for believing that all the notes, including that in question, were affected by any general understanding as to their place of payment.

On the main question we think the issue had to be left to the jury, whether the note was drawn in its actual form under some contrivance on the part of the plaintiffs by means of that form to obtain unlawful and usurious interest.

We do not concur in the plaintiffs' construction of the statute to the extent to which it has been urged—namely, that the right of charging the commission is wholly unqualified, and unaffected by any suggestion that the place of payment is not *bonâ fide*, but contrived by the plaintiffs as a pretext and colour for charging more interest than the law allows.

We think the bank is not called on to make any inquiry as to the place of payment of a note, or why the parties seeking for discount have chosen to make it so payable. They may lawfully assume that the parties concerned had their own reasons for selecting a place of payment different from the place of making or of discount.

Neither should we consider it any evidence to prove such a defence as the defendants here have thought proper to set up, that officers or agents of the bank had been heard to say that the bank preferred discounting paper payable elsewhere for the express reason that on such paper the discounters could by law charge a higher rate of interest or a statutable commission. Such a declaration we regard as perfectly unobjectionable, being merely an avowed preference for one class of negotiable security over another.

The intelligible distinction seems to us to lie in proving

that the note is made so payable at the instance of or by the contrivance of the bank authorities, who, aware that the note would otherwise be made payable at the place where it is offered for discount, suggest, or manage, or contrive to have it made payable elsewhere, solely for the purpose of obtaining the usurious interest, which in such case ceases to be a statutable commission, and becomes mere usury.

As before remarked, the bank have a right to assume that all notes offered for discount are drawn and payable as the parties thought proper to frame them. No inquiry is necessary, and no presumption should, we think, arise that the bank had so required them to be drawn.

Much confusion often arises from a common practice in this country of taking notes for discount not, as in the proper course of business, from the party whose name appears last thereon, and who is legally held to be the holder under prior parties, but taking them from the maker, who brings them to the bank with one or two names on the back as indorsers, and tries to have them discounted.

The last indorser presenting a note suggests an ordinary business transaction. He offers to the discounters a security importing a good title in himself as a holder for value. The maker of an indorsed note offering it for discount suggests no such business transaction, but rather a mere attempt to raise money by accommodation indorsements.

It is possibly from this course of dealing that questions may arise as to the reason why notes are made payable in any especial form in cases like the present. Between the bank and the holders of *bonâ fide* paper tendered for discount a question like this would perhaps never occur.

We may add that the mere fact of parties who intended to apply for discount thinking that the bank would prefer to negotiate paper payable elsewhere as being more profitable, and for that reason so drawing these papers, ought not in our judgment to invalidate the transaction. To sustain this defence we think proof should be given that the provision for payment to be made elsewhere was the act or contrivance of the bank, for the especial purpose of obtaining usurious interest under colour of a lawful commission.

It is to be hoped that the legislature will place this important question beyond doubt, as well in the interest of legal certainty as of commercial morality. The experience of years has proved too clearly that persons will always be found ready to borrow money upon any terms, and afterwards to refuse payment on any ground, with or without merits, that the ingenuity of counsel may suggest.

The point involved in this case being one of great importance, possibly understood in a clearer light after the elaborate discussion it has elicited, we think the plaintiffs may, on payment of costs within one month, be allowed the opportunity of taking the opinion of another jury. In this view we abstain from any further remark on the evidence adduced.

New trial on payment of costs.*

MEMORANDUM.

During this term the following gentlemen were called to the bar: SIMON BOLIVAR NEWCOMB, CAMPBELL UPPER, MACNIEL CLARKE, EDWARD GEORGE MALLOCH, DUNCAN CHISHOLM, FREDERICK FENTON, CHARLES LEMON, ELMES HENDERSON, THE HONOURABLE GEORGE ETIENNE CARTIER, WILLIAM FREDERICK READ, JOHN BAIN, ANDREW FRASER M'PHERSON, JOHN ELLEY HARDING, THOMAS KEARTON MORGAN, FREDERICK DREW BARWICK, GEORGE ORMOND FREEMAN.

* This case was decided last term. On a second trial the plaintiffs obtained a verdict, which was not moved against.

EASTER TERM, 29 VICT. 1866.

(May 21st to June 2nd.)

Present :

THE HON. WILLIAM HENRY DRAPER, C.B., C.J.

„ „ JOHN HAWKINS HAGARTY, J.

„ „ JOSEPH CURRAN MORRISON, J.

IN RE DROPE AND THE CORPORATION OF THE TOWNSHIP OF
HAMILTON.

By-law—Delay in moving against.

The court refused a rule *nisi* to quash a by-law passed to stop up a road, where the relator was aware of the intention to pass it, and allowed two years and three months to elapse before moving, the objections urged being that there was no applicant for such by-law, and no sufficient notice of it published.

Hector Cameron moved for a rule calling on the corporation to show cause why a by-law passed on the 3rd of August 1863, stopping up a road or highway opened by the authority of a by-law passed in 1854, should not be quashed, on the grounds: 1. That there was no applicant for such by-law, as required by the Municipal Institutions Act, Consol. Stat. U. C. ch. 54, sec. 321. 2. That there was no sufficient publication in the local newspaper of a notice of the intended by-law, and that the same was passed prematurely and within four weeks from the first publication of the notice, and that the Council allowed the relator no opportunity of opposing the by-law.

The affidavit on which it was moved stated affirmatively

that there was no applicant for the passage of this by-law. It further set out a resolution passed by the township council on the 26th of May 1863, that the clerk should give the necessary notice that the Council would after thirty days from publication pass a by-law closing up the road in question; that a notice dated 2nd July 1863 was published in a local newspaper on the 8th, 15th, 22nd, and 29th July 1863; and that on the 3rd of August 1863 the relator wrote to the clerk of the court referring to this resolution, and objecting to the proposed by-law, and requesting "if any action is taken" that the clerk will please to record his objection. It was further sworn that an indictment was preferred (it was not stated at whose instance) against the Corporation for not keeping this road in repair at the June Sessions, 1862, which, as the defendant did not appear, was removed into this court by *certiorari*, but was not tried until the last assizes for Northumberland and Durham.

Cur. Adv. Vult.

DRAPER, C.J., delivered the judgment of the court.

We are of opinion that upon the relator's own showing there has been too great a delay to justify our summary interposition to quash this by-law. Our refusal to interfere in this way will not legalize it, nor will it prevent the assertion of any right the relator may have to use this road. It is obvious his attention was drawn to this matter in August 1863; that he was aware of the intended proceeding; and yet his first application to this court is not made until more than two years and nine months afterwards. We think it right to follow the decision in the Court of Common Pleas, of *Hill v. The Municipality of Tecumseth* (6 C. P. 297), and *Cotton v. The Municipality of Darlington* (11 C. P. 265), which followed the first-named decision.

We therefore refuse the rule.

Rule refused.*

* See also *Ianson and the Corporation of Reach*, 19 U. C. R. 591; *Standley and the Corporation of Vespra and Sunnidale*, 17 U. C. R. 69; *Sheley and the Corporation of Windsor*, 23 U. C. R. 569.

GREENHAM v. JOHN WATT, JAMES WATT, AND HUGH WATT.

Contract—Statute of Frauds—Consideration.

The declaration stated that by agreement between the plaintiff and J. and H., two of the defendants, the plaintiff was entitled, on delivering to them certain goods, to a conveyance in fee, free from encumbrances, of two lots mentioned, which were then subject to a mortgage to one Absalom Shade; and in consideration that the plaintiff would accept a conveyance and deliver up the goods, the defendants by an agreement in writing promised to pay the plaintiff \$500 in six weeks, if in the meantime the lots should not be released from the mortgage. Averment, that the conveyance was so accepted and the goods delivered; that the mortgage had not been discharged; and that the defendants had not paid the \$500.

The two agreements were put in. The first, under seal dated 1st June 1865, set out the sale of the goods by the plaintiff to the defendants J. and H., for which they agreed to pay \$1400—\$200 on receiving possession, \$500 by a conveyance in fee of the two lots, to be taken as cash for that sum, and the remaining \$700 by instalments, as stated in the agreement. The second agreement, dated 10th June, was as follows: "Six weeks after date we, or either of us, promise to pay to Thomas Gibbs Greenham \$500 value received, if in the meantime park lots 7 and 8 in the Garvan survey be not released from the subsisting mortgage thereon to Absalom Shade, deceased." Signed by all the defendants.

Held, assuming the promise sued upon to be within the statute of frauds, either as a contract by the third defendant to indemnify against the default of the others, or as respecting an interest in lands; that the two agreements (the connection between which was established by their contents), construed with the surrounding circumstances to be gathered therefrom, together with the averments in the declaration, sufficiently showed the consideration for the defendants' promise.

Semble, however, that there need have been no writing to bind the third defendant, for the consideration was executed by the plaintiff delivering the goods without getting a conveyance free from encumbrances.

Held, also, that under the first agreement the defendants were not entitled to possession of the goods until payment of the \$200 and execution of the conveyance.

THE declaration stated that whereas by agreement dated the 1st of June 1865, made between the plaintiff of the first part and James and John Watt of the second part, the plaintiff was entitled, upon delivery to the said James and Hugh of a certain printing establishment therein mentioned, to a conveyance in fee-simple, free from encumbrance, of two park lots in the Garvan survey (mentioned in the declaration) from the defendants James and Hugh, or the person holding the title of the said land for them, and whereas those lands were then subject to a mortgage to one Shade; in consideration that the plaintiff would accept a conveyance of those lots from the defendant John Watt, in whom the estate was vested subject to the mortgage, without a previous discharge of the mortgage, and would deliver possession of the said

printing establishment to the defendants James and Hugh; in order to complete the sale thereof the defendants, by an agreement in writing dated the 10th of June 1865, promised to pay the plaintiff \$500 six weeks thereafter, if in the meantime the said park lots should not be released from the said mortgage. Averment, that the plaintiff, relying on the said agreement, accepted a conveyance from the defendant John without a previous discharge of the mortgage, and delivered possession of the printing establishment to the defendants James and Hugh; that the six months elapsed before the commencement of this suit; that the mortgage to Shade has not been discharged; and all conditions were performed, etc., yet the defendants have not paid the \$500.

Second count, for money due on an account stated.

Pleas, to the first count, that the plaintiff was not at the time mentioned in the declaration entitled to a conveyance in fee-simple, free from all encumbrances, of the lands mentioned, and that the defendants did not promise as alleged. And to the second count never indebted.

The case was tried at Guelph, in October 1865, before *John Wilson, J.*

The plaintiff put in the two agreements mentioned in the declaration. The first was under seal, dated the 1st of June 1865, between the plaintiff and the defendants James and Hugh, and witnessed that the plaintiff, in consideration of \$1400, to be paid as thereafter mentioned, had sold to James and Hugh certain printing presses, type and printing material, of the British Constitution and Fergus Freeholder printing office or establishment. And the defendants James and Hugh agreed to pay \$1400 in consideration of the sale, as follows: \$200 on receiving possession of the printing establishment, and \$1200 by a conveyance in fee-simple, free of all encumbrances, of the park lots above mentioned, to be taken as cash at a present value of \$500, and the balance of \$700 as stated in the agreement, which contained other matters not bearing on this action.

The second was as follows: "\$500. Fergus, 10th June 1865. Six weeks after date we, or either of us, promise to pay to Thomas Gibbs Greenham \$500 value

received, if in the meantime park lots 7 and 8, in the Garvan survey, be not released from the subsisting mortgage thereon to Absalom Shade, deceased." This was signed by all the defendants.

The defendants' counsel took various objections to the plaintiff recovering on this evidence, on which the learned judge reserved leave to move, and the plaintiff had a verdict.

In Michaelmas term *Winstanley* obtained a rule, calling on the plaintiff to show cause why a verdict should not be entered for the defendants, pursuant to leave reserved.

He objected, 1. That there was no evidence to show that the defendants promised for the consideration stated in the declaration, the agreement sued upon showing no consideration. 2. That if the consideration alleged had been proved, it would have been *nudum pactum*, for as to that part of it relating to a delivery and acceptance of a conveyance with a previous discharge of the mortgage the consideration flowed from the same source as the promise, and as to that part relating to the delivery of the printing establishment the plaintiff was already under a legal obligation to deliver the same. 3. That the first agreement provides for the conveying the lands free from encumbrance, and the agreement of the 10th June cannot be set up in any way to extend, modify, or control the previous document under seal. 4. That there was no mutuality in the agreement, as the plaintiff was not bound to wait the six weeks before attempting to compel the defendant to convey. 5. That no consideration appears on the face of the agreement of the 10th June, and none can be imported into it. 6. That the delivery of the possession of the printing establishment was a condition precedent to everything which followed, and could not form a consideration for the promise sued on. 7. That if the contract were, as is alleged in the declaration—in consideration that the plaintiff would accept a conveyance, etc., the defendants would either obtain a release from the mortgage or pay \$500,—it would be a contract for an interest in lands within the statute of frauds, and the agreement should state everything and should show the consideration.

He also moved for a new trial on the law and evidence, and because the plaintiff should have recovered only nominal damages.

In this term *Anderson* showed cause.

A. Crooks, Q.C., supported the rule, citing *Lampleigh v. Brathwait*, 1 Sm. Lea. Cas. 135; *Middleditch v. Ellis*, 2 Ex. 623; *Morton v. Burn*, 7 A. & E. 19; *Shadwell v. Shadwell*, 9 C. B. N. S. 159; *Smart v. Harding*, 15 C. B. 652; *Sparrow v. Paris*, 7 H & N. 594; *Laycock v. Pickles*, 10 Jur. N. S. 336; *Ib.* 668; *Mayne on Damages*, 67, 68; *Middleditch v. Ellis*, 2 Ex. 623; *Hulse v. Hulse*, 17 C. B. 711; *Long v. Bowring*, 10 Jur. N. S. 668.

DRAPER, C.J., delivered the judgment of the court.

The agreement of the 1st of June, the execution of which is not denied, states the following facts: That the plaintiff had sold to two of the defendants a certain printing establishment; that the two defendants, the purchasers, agreed to pay \$1400, the price thereof, as follows: \$200 on receiving possession, and the balance by a conveyance in fee-simple, free of all encumbrances, of certain lots of land, to be taken as cash for \$500, and the remainder, \$700, by equal instalments with interest, payable in one, two, and three years, to be collaterally secured by their note for \$200, indorsed by their father, the other defendant, at two years from the 10th of June 1865, and by a chattel mortgage for \$500 on the goods sold to them; and the purchasers were to have possession on the 10th of June 1865.

On this day the second instrument bears date, an instrument which, in all probability, the parties supposed and intended to be a promissory note made by the three defendants, but which is in law a mere agreement, for the payment of the money is clearly made conditional by the words "if in the meantime" the lots mentioned in the first agreement "be not released from the subsisting mortgage thereon to Absalom Shade, deceased" (*Robins v. May*, 11 A. & E. 213).

The question then is, whether as an agreement it is in

law valid and binding upon the defendants, and this defence is open to the defendants on the second plea.

There has been no parol evidence given; all therefore depends upon the construction to be placed on the two instruments. Assuming this promise to be within the Statute of Frauds, the consideration must appear, as was said by Erle, C.J., in *Shadwell v. Shadwell* (9 C. B. N. S. 173), "in the writing containing the promise construed with the surrounding circumstances to be gathered therefrom, together with the averments on the record."

We find no difficulty in connecting the two documents by matter apparent upon them. The first agreement states that \$500 of the consideration given by the defendants James and Hugh was to be paid by a conveyance in fee-simple, free of all encumbrances, of park lots 7 and 8 in the Garvan survey, etc. The second agreement contains a promise by the same defendants to pay \$500 six weeks after its date, if in the meantime park lots 7 and 8 in the Garvan survey be not released from the subsisting mortgage thereon to Absalom Shade. It is also stated on the record that the third defendant, John, owned these lots subject to a mortgage to Absalom Shade, and that the plaintiff accepted a conveyance thereof from him subject to that mortgage, and put the defendants James and Hugh into possession of the printing establishment; and neither of these facts are denied further than by the general traverse of the defendants' promise to pay.

We think that, upon the true construction of the first agreement, the defendants were not entitled to be let into possession until they had paid the sum of \$200 in cash, and the sum of \$500 by a conveyance, etc. The plaintiff tacitly admits the first payment, and he plainly asserts that he has waived the strict performance of the second, and has accepted this second agreement in lieu thereof. We think we are therefore warranted in saying that these two writings, the connection between which is established by their contents, construed with the surrounding circumstances to be gathered therefrom, together with the averments on the record, show the consideration for the

defendants' promise to be, that the plaintiff would take the conveyance from the defendant John, though the lots conveyed were not free from all encumbrances, and would deliver possession to the defendants James and Hugh of the printing establishment, though they had not fulfilled a leading stipulation necessary to entitle them to claim it.

Whether, therefore, this agreement is to be looked upon as a contract by the defendant John to indemnify the plaintiff against the default of the other defendants in not procuring a conveyance free from all encumbrances, or as a contract respecting some interest in lands—in short, if it comes within the 4th section of the Statute of Frauds—we think the agreement, taking the meaning of that word according to the decision in *Wain v. Warlters* (5 East, 10), is evidenced by writing signed by the parties to be charged therewith.

Though with some doubt, we think that there need not have been a writing signed by John Watt in order to bind him to the payment of the \$500, and that the averment that the promise was in writing was immaterial. The consideration for this promise was in fact executed by the plaintiff, for he gave the defendants James and Hugh possession of the printing press, etc., without getting a conveyance of the two park lots free from all encumbrances.

As to damages, we cannot see any ground for doubting that as the plaintiff was to have got the land free, and has upon the faith of the second agreement accepted it subject to encumbrance, he has a right to indemnity. He has assumed the responsibility of paying off the mortgage to Shade.

We think the rule should be discharged.

Rule discharged.

BRYCE ET AL. v. DAVIDSON.

Partnership—Dissolution—Name of the firm used afterwards.

Defendant, on the 8th of August 1863, gave a bond to the plaintiffs conditioned to pay to the extent of \$2000, debts then due or to be incurred to them by the firm of M. & G., carrying on business at Galt, who the plaintiffs had been supplying with goods.

In July or August 1863 G. went to Buffalo, telling M. that he was going to leave the firm; and before going in June, he gave to the defendant, his uncle, a power of attorney, which recited his intention to reside some time in Buffalo, and that his interest in the firm would continue notwithstanding, and authorized defendant to carry on the business, with power to close it up, and to sign bills, notes, etc., in G.'s name, or that of the firm. After he left the sign, by the defendant's direction, was changed to M. & Co., but defendant told M. to give notes in the name of M. & G. to the plaintiffs for goods supplied after the date of the power of attorney. In June a notice of intended and in September a notice of actual dissolution was published in a local paper, of which the plaintiffs were not proved to have notice. In April 1864 M., with the defendant's knowledge, signed notes in the name of M. & G. payable at different dates, for the balance according to an account then rendered, and a separate note for goods bought in March previous; and in September 1864 defendant, in writing to the plaintiffs, expressed his hope that it would soon be an advantage to them to continue their account with M. & G. without his guarantee. G. returned to Galt in September 1863, and was employed in the bank of which defendant was agent; but he said he had not authorized his name to be used to the notes given in April 1864. In an action against defendant on this bond the court being left to draw inferences of fact,

Held, that G.'s return from Buffalo, without in any way interfering with the defendant, was not a revocation of the power; that notwithstanding the dissolution, which must be held to have taken place in September 1863, he might permit his name to be used as it was in closing up the business; that the power sufficiently authorized defendant so to use it; that the inference from the facts was, that in what he did he was acting under such power; and that defendant therefore was liable for the purchases made in March 1864.

DECLARATION on a bond made by defendants, dated the 8th of August 1863, in a penalty of \$3000, subject to a condition—after reciting that William Muirhead and James Geddes had been trading together as merchants, and were indebted to the plaintiffs; that the plaintiffs were desirous of obtaining further security for that liability and for any further debt which Muirhead and Geddes might incur to the plaintiffs; that defendant, at the request of Muirhead and Geddes, had agreed to execute the bond to secure the plaintiffs \$2000, it being understood that the plaintiffs should continue to supply M. & G. with goods in the usual way of trade; that if M. & G. should pay or cause to be paid all such debts as were then due and owing or accruing by them to plaintiffs, and all such debts and liabilities as they might thereafter incur to the plaintiffs, or in default thereof if

defendant should pay the same to the extent of \$2000, then the bond should be void. *Averment*, that the plaintiffs did supply goods to M. & G., who thereby incurred large additional debts, and that M. & G. did not pay the plaintiffs the debts due and accruing before the execution of the bond or thus incurred after, and there was due to the plaintiffs by M. & G. an amount exceeding \$2000, whereof defendant had notice, and was requested to pay. Breach, non-payment.

Plea, on equitable grounds, that the defendant entered into the bond and the plaintiffs accepted him as surety only; that after the making of the bond, to wit, on the 1st of October 1863, M. & G. dissolved partnership, of which the plaintiffs had notice; that M. continued to carry on the business on his own account under the name of William Muirhead & Co., and the plaintiffs after the dissolution continued to furnish M. with goods under such new name, and on the 2nd of April 1864, without the knowledge and consent of defendant, the plaintiffs and M. stated accounts as well of the indebtedness of M. & G. as of claims and accounts of M. alone so trading under the name of William Muirhead & Co., and on such accounting the indebtedness of M. to the plaintiffs was stated and found to be \$1755·72, for the payment whereof it was agreed by plaintiffs and M., for a good and valuable consideration to the plaintiffs, that M. should have an extension of time, without the knowledge and consent of defendant, beyond the credit in the ordinary course of business, to wit, for \$585·72, until the 18th of May 1864, and for \$585 until the 18th of June 1864, and for \$585, residue of the said debt, until the 18th of July 1864, for which sums, and according to agreement with the plaintiffs, M., without the knowledge and consent of defendant, gave his promissory notes payable respectively at the dates above named, and received the extension of time for payment; that after the notes matured it was further agreed between the plaintiffs and M., without the knowledge or consent of defendant, for a good and valuable consideration to plaintiffs, that the plaintiffs should give further time to M., and the plaintiffs without the knowledge and consent of defendant gave time to M. and forbore to sue him for

the said debt during the time so agreed upon, by reason whereof defendant as surety was discharged.

The defendant also pleaded payment by M. & G. Issue.

The trial took place in November 1865, at Toronto, before *Adam Wilson, J.*

It appeared that Muirhead and Geddes entered into partnership as merchants at Galt in the spring of 1862, whether by any agreement in writing or verbally was not clear; there was apparently no partnership deed. On the 8th of August 1863 the defendant made the bond declared upon. On that day M. & G. owed the plaintiffs \$1831.55. In July or August 1863, as Muirhead proved, Geddes left Galt to go to Buffalo, telling Muirhead he was going to leave the firm. A notice of intended dissolution and of a clearing sale, dated the 2nd of June 1863, was published by Muirhead in a Dumfries newspaper. The date of publication did not appear, nor was it shown when or how the plaintiffs had notice of it. At first Muirhead said that Geddes' retirement was made known to the parties with whom the firm dealt, but he afterwards said he did not remember telling the plaintiffs that Geddes had retired from the business; "it was published in the Galt newspapers—of course they must have known it." He thought they knew it before the young man was at Galt talking with him and defendant, as subsequently stated; and Muirhead stated that the defendant might have had something to do with the publication, as he had told defendant that if Geddes did not go out of the partnership he would. Geddes represented his leaving the firm, so far as transacting any of its business, to have been in June. On the 29th of September 1863 a notice of actual dissolution was published in the same paper.

Before going to Buffalo he gave a power of attorney to the defendant, his uncle, dated the 2nd of June 1863, which recited his intention to reside some time in Buffalo, and that his interest in the business carried on under the firm of M. & G. would continue to exist notwithstanding his intended residence in Buffalo. By this instrument he authorized the defendant in his (G.'s) name to carry on the said business, and, among other things, in his name and in the name of

the firm to make and sign bills and notes, and to do any other act legally appertaining to the same, with power to close up the business of the firm; with full powers of substitution and revocation. Up to the time Geddes went to Buffalo the sign over the shop had been Muirhead & Geddes. Muirhead spoke to defendant about it, who told him to make it W. Muirhead & Co. After Geddes left defendant told Muirhead to sign notes "Muirhead & Geddes" to the plaintiffs for goods supplied by them after the date of the power of attorney, and also to pursue the same course towards another firm to whom he was surety for M. & G. Other transactions were conducted in the name of W. Muirhead & Co., and Muirhead in some respects acted as if he was solely interested in the business carried on in this latter name.

On the 2nd of April 1864 the plaintiffs furnished a statement of account against M. & G., showing a balance upon one set of dealings to be \$1755·72, and enclosing three promissory notes to be signed, falling due respectively on the 18th of May, June, and July 1864, the first for \$585·72, the others for \$585 each. This statement showed other purchases on the 9th and 31st of March 1864, amounting to \$628·44, and enclosed a note for that sum, to fall due on the 14th of September, to be signed. Muirhead signed all these notes "Muirhead & Geddes." At the foot of this account was a letter, as follows: "Dear Sirs,—To close up open account we send you notes for signature drawn at dates which we shall count upon being met, and send you at the same time all the paper we hold of yours; please send notes when signed. The bond we hold from Mr. Davidson is drawn in favour of Muirhead & Geddes; please get him to write us a letter holding himself bound for Muirhead & Co., the same as for M. & G., and that the bond is to hold good to us for supplies to M. & Co."

Muirhead also swore that M. & G. got goods from the plaintiffs after the bond was given, and the defendant told him to sign notes for these purchases in the name of M. & G., and that defendant was aware of the three notes for \$585 each, and supplied Muirhead with the money which he paid upon them. On one occasion, after Geddes had left

(no time stated), a young man who was travelling for the plaintiffs met Muirhead at the defendant's office, and spoke to him about the firm changing, when the defendant said he considered the security holding as fast for Muirhead & Co. as for M. & G.

The defendant recovered a judgment against M. & G. In September 1864 the defendant wrote a letter to the plaintiffs containing the following: "Muirhead & Geddes have just now handed me your memorandum of the 6th instant. . . . Up to this time I have interfered very little with their business, but will now see they reduce their overdue balance with the least possible delay, and hope that shortly they will be able to prove that it will be an advantage for you to continue the account without any guarantee from me." On the 14th of December 1864 defendant wrote a letter to the plaintiffs containing the following: "Muirhead & Geddes finished taking stock and balancing their books on the 10th instant, when they furnished me with a statement of their affairs. . . . It certainly greatly surprised me. . . . You are aware that on the 20th of May 1863 I got judgment against them for \$3000, amount of their notes I had become responsible for. Up to the 10th instant I had not the least idea of ever having occasion to press them for this claim; but now, in order in some measure to protect myself, I have determined to place an execution in the sheriff's hands, for my guarantee to yourselves and Messrs. F. W. Gates & Co. will leave quite enough for me to rank for should their creditors determine to close them up."

Muirhead further stated that the defendant did enforce his judgment in December 1864, and seized all his money and books. He further swore that he was in the habit of telling defendant all he owed, and when notes would be falling due. This was after Geddes left; and when Muirhead was buying goods, giving notes for purchases or renewals, defendant told him to sign the notes in M. & G.'s name. All the time that Muirhead carried on the business after Geddes left he signed accommodation notes "M. & G." as well as "W. M. & Co." at the agency of the bank at Galt

which defendant managed, and he (M.) got money on such notes until he failed.

On the 9th of January 1865 a notice was published under the Insolvent Act of 1864, signed with the names of W. Muirhead and James D. Geddes composing the firm of M. & G., and William Muirhead composing the firm of W. M. & Co., in which the plaintiffs were stated to be creditors for \$2371·24, and the defendant a creditor for \$3321·37. In March 1865 the balance in plaintiffs' books against M. & G. was \$2038·85, and against Muirhead & Co. \$488·82.

From the first it appeared that Muirhead conducted the whole business. No mention was made in the evidence of Geddes taking any active part.

The defendant came to the plaintiffs in March 1865, as one of their witnesses thought (Cooch), to see about getting an extension of time for the payment of the debt due to them. No difference was then made between M. & G. and W. M. & Co.; defendant wanted an extension of time *for them*; he did not want *them* pressed. The arrangement suggested (though not said to have been so by defendant) was that M. & G. should give their notes to be indorsed by defendant; but it was not carried out. Geddes swore that he left Galt for Buffalo about the 1st of June 1863, intending to remain away about three months, and returned to Galt on the 19th September, and after this was employed in the bank under the defendant; that he retained no interest in the firm of M. & G., which was dissolved in September 1863 with Muirhead's consent; that he did not authorize his name to be used as it was used to the notes of March 1864; that he told Muirhead in June he was quitting the firm for good, and that he took no part after the dissolution in September in the business; that he had a recollection of talking with Muirhead in September about a dissolution. The terms were, before he left, that he was to retire and be free from all liabilities. He represented that the power of attorney was to dissolve the partnership.

The learned judge asked the jury: 1. Was there a dissolution of the firm of M. & G., before or after the time of

the giving of the bond of the 8th of August 1863? The jury answered—No.

2. Was the name M. & G. after the dissolution used by Muirhead on the notes given to the plaintiffs at the request of or with the knowledge and consent of the defendant? The jury answered—Yes.

3. Did the defendant, after the giving of the bond, authorize Muirhead to make new purchases from the plaintiffs in the name of or for M. & G.? The jury answered—Yes.

4. Did the plaintiffs, after the maturity of the notes given by Muirhead in the name of M. & G., extend the time of payment of such notes by taking other renewal notes for them, with or without the consent of the defendant? The jury answered—Yes.

During his charge the learned judge intimated to the jury that although the power of attorney was revoked by Geddes' return or interference, still if he knew that defendant authorized Muirhead to use the name of Muirhead and Geddes, and did not forbid it, he might be bound by Davidson's act; and they were asked to find upon this as a fifth question. They did not answer it, and neither of the parties pressed it.

The case went to them to answer the above questions and to find a verdict for the plaintiffs for \$2000, subject to the opinion of the court upon the facts and evidence, and with leave for defendant to have the verdict entered for him, or for such reduced sum as the court might direct, the court to be at liberty to draw such inferences as a jury might have done.

In Michaelmas term *M. Michael* obtained a rule calling upon the plaintiffs to show cause why the verdict should not be set aside and a verdict be entered for defendant, pursuant to leave reserved, or for a new trial, because the verdict was contrary to law and evidence; that the verdict was perverse, the jury having found that there was no dissolution of the partnership, and that no notice of such dissolution had ever been given to the plaintiffs, whereas the judge

directed the jury that the partnership had ceased, and the plaintiffs had sold goods to Muirhead knowing that Geddes had returned; or why the verdict should not be reduced to such amount as to the court might seem meet.

In Hilary term *Robert A. Harrison* showed cause, citing *Cornish v. Abington*, 4 H. & N. 549; *Sweeting v. Pearce*, 7 C. B. N. S. 449; S. C. in Ex. Ch., 9 C. B. N. S. 534; *Backhouse v. Hall*, 12 L. T. Rep. N. S. 375.

M. C. Cameron, Q.C., and *M. Michael* supported the rule.

DRAPER, C.J., delivered the judgment of the court.

The defendant's undertaking is to pay to the extent of \$2000 debts then due or to be incurred to the plaintiffs by the firm of Muirhead & Geddes. His liability is limited in amount by the terms of his contract. There is no limitation of time expressed; but as it depends on the debts incurred or to be incurred by an existing firm, when that firm ceased to exist no further debt could be created, unless under peculiar circumstances, which the defendant would be liable to pay.

It does not appear that the partnership between Muirhead and Geddes was created for any precise term; it was therefore a partnership at will. Hence, either partner might dissolve it at any moment. The partnership would then be considered as continuing only for the purpose of winding up its inchoate and incomplete transactions.

Both partners appear to have been desirous of dissolving. Muirhead says that he told the defendant that if Geddes did not go out of the firm he would, and Geddes left Galt telling Muirhead he would not return to the store, or to that effect. The notice published in the *Dumfries Reformer* says, however, the firm "being about to dissolve partnership," which is not a notice of an actual dissolution, and at the date of this notice (2nd June 1863) the firm was not dissolved. In *Emmet v. Butler* (7 Taunt. 599) the distinction is clearly recognised. The recital in the bond, as well as in the power of attorney given by Geddes to the defendant, shows not only that Geddes asserted his interest as a partner, but that

the firm was in actual existence. The latter authorizes the defendant to close up its business, and Muirhead continued with his knowledge and assent to deal with the plaintiffs in the name of M. & G. If Geddes had alone been solvent at the conclusion of these transactions, it would have been difficult for him to have resisted an action brought by the plaintiffs for goods sold to M. & G., or on notes signed in that name by Muirhead, with the sanction of the defendant, whose acts, so long as the power of attorney continued in force, were the acts of Geddes.

As between Muirhead and Geddes there is evidence of a dissolution, though it is not easy to fix the date with precision. Muirhead's advertisement in the *Dumfries Reformer*, dated 29th September 1863, furnishes evidence against himself, and Geddes in his evidence agrees. But an advertisement in a local newspaper is no evidence against any one who cannot be shown to have seen it (*Boydell v. Drummond*, 11 East, 144, note, per Lord *Ellenborough*). The only other evidence of notice of the dissolution to the plaintiffs is given by Muirhead, and he fixes no time when, as he says, "of course" they must have known it, though he does not remember telling them of it. No doubt the plaintiffs were aware of the change when they sold goods to the new firm of W. Muirhead & Co., but when this fact happened is not clear. I imagine there were concurrent dealings with the firms of M. & G. and W. M. & Co. The change of the sign by Muirhead is, as against him and all other parties who knew it, evidence of a dissolution, and coupled with an announcement of the change by circulars to old customers would be sufficient. (See *M'Iver v. Humble*, 16 East, 169.) That old customers are entitled to a more specific notice than one who never dealt with the firm appears from *Graham v. Hope* (Peake, N. P. C. 154).

But admitting notice to the plaintiffs of the dissolution soon after it actually took place, which was towards the end of September 1863, the circumstances of this case give rise to a further question, whether on the facts proved Muirhead, who must be deemed the continuing partner carrying on the business under a different name, had not authority to give

notes and to make purchases in the name of the dissolved firm. *Burton v. Issitt* (5 B. & Al. 267) bears on this question. So also does *Smith v. Winter* (4 M. & W. 454), though neither of them go far enough for the plaintiffs' purpose. If a partner actually retires, giving due notice thereof, and still permits his name to be used, he is liable on a bill accepted by his copartner in their joint names. So *Lord Ellenborough* held in *Williams v. Keats* (2 Stark. 290), and *Brown v. Leonard* (2 Chit. 120) is a clear authority to the same effect. (See Chitty on Bills, 40, 10th ed.)

In this case the most unequivocal, and as far as we see the first act affording evidence of a dissolution, is the removal of the names of M. & G. and the substitution of the name W. M. & Co. Coupling the notice published under date of the 29th of September 1863 with Muirhead's evidence, we think the dissolution may be held complete from that day, and that would be fatal to the plaintiffs' claim on the transactions of March 1864, unless the use of Geddes' name in them was made with his sanction.

A review of the evidence becomes necessary to determine this question, as the courts are specially empowered to draw conclusions of fact.

Geddes on the 2nd of June 1863, having agreed with Muirhead to dissolve, went to Buffalo, and returned on the 19th of September. He then went into the bank office at Galt under the defendant, his uncle, who was the agent or manager. Before going away he told Muirhead he should not return, *i.e.* to the business, for he obviously meant to come back to Galt. There is no evidence that he ever did an act connected with the firm or the dissolution after his return. The utmost stretch of his recollection was that he talked with Muirhead about a dissolution on the terms that he should retire and be free from all liabilities. On the 2nd of June he gave his uncle a power of attorney, which contains the most ample authority to carry on the business of the firm, and to use the name of Geddes and of the firm for the purpose, including the making and execution of bills, bonds, notes, cheques, specialties, or other instruments in writing, and the performing all and every act and deed of

whatever name and nature legally appertaining to the business of the firm, binding him (G.) as irrevocably and firmly as if himself were present thereto consenting, and he further gives his attorney full power *to close up the business of the firm* as fully as he could do as a member thereof if the power of attorney were not made or executed. The recital that Geddes intended to leave Galt and to reside some time in Buffalo, and that his interest in the business carried on under the name of M. & G. would continue to exist notwithstanding his residence in Buffalo, may seem to suggest an intention on his part to resume his position on his return; but the powers given are not limited in point of time, and the power to close up the business, which in his evidence he referred to as what he considered the leading object of the power, would not seem intended to be annulled by the simple fact that he returned and entered into a different occupation.

This power was not, so far as the evidence showed, directly and formally revoked by writing or verbal declaration, and we see nothing in the facts proved from which to imply a revocation. If Geddes had in any way assumed to do what he had empowered the defendant to do, that would no doubt have revoked the power, but he does not profess to have done any such act, nor is there any evidence *abundant* of his having done so. The change of the name over the shop was, if not directed, assented to by the defendant. He came back on the 19th of September. The first published notification of the new business bears date on the 29th, and the change of name probably took place between those dates. The defendant, by his bond, recognises the existence of the firm of M. & G. on the 8th of August, and as then likely to incur further liabilities to the plaintiffs. Geddes' employment in the bank after his return affords the strongest probability that he became aware of the accommodation notes on which Muirhead stated he got money, and which were signed M. & G.

It appears to us the proper conclusion from the evidence is, that the defendant in the directions he gave to Muirhead as to buying goods in the name of M. & G., and signing

that name to promissory notes, was acting as the attorney of Geddes in closing up the business, and that he advisedly abstained from a final close until after the liabilities now advanced against him were incurred. Geddes was under his control. It nowhere appears that his retirement arose from any contemplated failure of the firm, and the defendant's conduct tends to the conclusion that he thought it would turn out well. His letters of the 7th of September and 14th of December 1864 show this. Indeed, the first of these letters would almost be a *suppressio veri* or a false suggestion, if he then, holding the power of attorney, contemplated an almost immediate dissolution of the firm, and yet wrote that he hoped that M. & G. would shortly be able to prove it would be an advantage to the plaintiffs to continue the account without a guarantee. That Geddes, notwithstanding the dissolution, might with a view to a satisfactory closing up the business of the dissolved firm have authorized the use of his name as it was in fact used, will not we suppose be denied; and as he delegated his own authority to the defendant to close up the business, we do not see any reasonable interpretation of what the defendant did except that he was acting as the attorney for Geddes. We have seen no authority which warrants the conclusion that Geddes' return from Buffalo to Galt operated as a revocation of this power; and either the defendant did interfere, and induced Muirhead to impose upon the plaintiffs by a worthless signature, or he acted as the authorized attorney of Geddes. He ought not on light grounds to be permitted to relieve himself by the first of these alternatives from his liability to the plaintiff as surety for M. & G.

We are of opinion that Geddes might, notwithstanding an actual dissolution, have permitted his name to be used as it was used, and would in that case have been liable to the plaintiff; that the power of attorney is comprehensive enough in its language to authorize the defendant to bind Geddes in this respect; that in what he did, in directing or sanctioning Muirhead to use Geddes' name after the partnership was dissolved, he was acting under the power;

and that there is no evidence that this power was ever revoked.

We think, therefore, the rule should be discharged.

Rule discharged.

GRIMM v. FISCHER.

New trial—Verdict under £20.

The rule that a new trial will not be granted where the verdict is under £20, though against evidence, refers to the amount of the verdict, independent of any sum paid into court.

Where, therefore, the verdict was for \$84, exclusive of \$100 paid into court, and a new trial could have been granted only on payment of costs, the court refused to interfere.

Britton applied for a rule calling on the plaintiff to show cause why there should not be a new trial; on two grounds—first, the insufficiency of the evidence given at the trial for certain purposes; and, second, on affidavits.

Cur. Adv. Vult.

DRAPER, C.J., delivered the judgment of the court.

Looking for the moment no further than the affidavits, I should readily concur in granting the rule, and unless a satisfactory answer was given in granting a new trial.

But there are other considerations which cannot be overlooked. The defendant was in court when this cause was called on for trial, and though aware that none of his own witnesses had arrived, resolved to make no application for postponement. He explains that he had no idea that the plaintiff was about to call one Telghinar as a witness, who, as some of the affidavits represent, is very hostile to him (defendant), and whose evidence appears to have mainly contributed to the verdict being as large as it is; but this is not in itself a reason sufficient to repel the effect of the trial being allowed to proceed with defendant's concurrence.

Then we have the amount of the verdict, which is only \$84 $\frac{6}{100}$, exclusive of \$100 paid into court. The English rule is that where the verdict is under £20 (sterling) the court will not grant a new trial, though such verdict is against evidence. The case of *Bryan v. Phillips* (3 Tyrw.

181, 1 Cr. & M. 26) is very much to the purpose, where in assumpsit the pleas were non assumpsit, and a tender of £12, 10s., and the verdict was for defendant on the tender, and for the plaintiff on the other issue, with £19, 10s. damages in addition to the £12, 10s. It was pressed on the court that in effect the plaintiff recovered more than £30, and so was not within the rule as to £20. But the court said the defendant was only liable to pay £19, 10s. on the verdict; that the principle of the rule was that in the absence of misdirection the defendant would have to pay costs, and that the courts made a rule not to grant a new trial when the verdict was less than £20, unless in a case where they could grant it without costs. *Bevan v. Jones* (2 Y. & J. 264) is to the same effect.

We could not grant a new trial in this case except on payment of costs; as the whole question is one of evidence, wherefore, we think, there should be no rule.

Rule refused.

THE CANADA COMPANY *v.* M'DONALD.

Money had and received—Privity.

Defendant had contracted to supply the Buffalo and Lake Huron Railway Company with wood. In 1858, by instrument under seal between them, in consideration of \$22,000, defendant released the railway company from the contract, and the company covenanted to indemnify defendant against all contracts made by him with one M., among which was a contract to convey to M. two lots of land; one in South Easthope, which had been leased by plaintiffs to defendant, the other in Zorra, which had been leased by the plaintiffs to one J., who had assigned it to M. In 1865 defendant wrote to the railway company stating that the plaintiffs had claimed from him rent in arrear on these two lots amounting to \$2000, and offering, if the company would pay him that sum and reconvey the leases, to assume them for the future. The company assented, paid him the \$2000, transferred to him his leases which he had transferred to them, and took a receipt under seal from defendant as in full of all claims for such leases, by which receipt defendant discharged the company of all further liability in respect of such leases under the indenture of 1858. The company had previously paid the rent of both these lots, and defendant after receiving this money paid the rent on the South Easthope lot. The plaintiffs having recovered from defendant as for money received to their use—

Held, that the verdict was wrong; for though the settlement was made on the basis of the amount due to them on the leases, yet it was paid to defendant not as the plaintiffs' money, but as the price of the railway company's discharge, and there was no privity between the plaintiffs and defendant.

THE first count in the declaration was for rent on a lease

made by plaintiffs to defendant for ten years from the 1st of February 1857 of part of lot 37, in the 3rd concession of South Easthope, at the yearly rent of £26, 12s. 2d., payable on the 1st of February in every year during the term, and which defendant covenanted to pay. Common money counts were added.

Pleas, 1st, As to \$487.45, parcel of the moneys claimed in the first count, payment into court. 2nd, Payment as to the residue. 3rd, Never indebted to the common counts.

The plaintiffs accepted the money paid into court in discharge of the cause of action in the first count, and took issue on the pleas to the residue of the declaration.

The cause was tried at the winter assizes for York and Peel before *Hagarty, J.*

The whole question turned on the count for money had and received. The facts appearing were, that late in 1856 the defendant had contracted to supply the Buffalo and Lake Huron Railway Company with wood; and in 1858 these two parties, by indenture dated 31st August of that year, agreed to cancel the agreement, and in consideration of \$22,000 the defendant discharged and surrendered up to the railway company that contract, and released them therefrom, and he transferred to them certain contracts he had made with other parties set out in a schedule marked A for the delivery of wood, and all his rights thereunder, and covenanted to make no claim on the railway company under the original contract. This indenture also recited an agreement by defendant to transfer to one J. M'Kirdy contracts made with various other parties, and to convey to him certain lands, and a schedule of these contracts and lands was annexed, marked B. And the railway company covenanted with defendant to assume his position with respect to all the contracts in schedule A, and to indemnify him from those contracts and from the contracts and agreements mentioned in schedule B, and all damages, costs, expenses, suits, actions, and proceedings in respect thereof.

In schedule B was entered lot 37, 3rd concession Easthope, and lot 30, 14th concession Zorra.

The lot in Easthope had been leased by the plaintiffs to the defendant.

The lot in Zorra had been leased by the plaintiffs in 1857 to one Judson. In 1858 he assigned it to M'Kirdy, who in 1859 assigned it to C. & B., but this assignment was cancelled in April 1865, and the lease, which was in the hands of Mr. M'Lean, the secretary of the railway company, was given up to the defendant. Prior to April 1865 the plaintiffs had claimed the rent of this lot from the railway company.

On the 2nd of January 1865 the defendant wrote a letter to Mr. M'Lean as follows:—

"DEAR SIR,—The following demands have been made on me by the Canada Company for rents on leases belonging to your company, viz.:—

No. 5598, lot 37, 3rd concession S. Easthope,

Rents in arrear to 1st February last . . .	£88	15	0
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„ due 1st proximo	26	12	0
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No. 3097, lot 30, 14th concession Zorra,

Rents in arrear to 1st February last . . .	294	6	0
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„ due 1st proximo	90	0	0
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£499 13 2*

"No doubt you would be gladly rid of claims hereafter in respect to these leases. If this assumption be correct, and you pay me the amount accrued to 1st proximo of £499, 13s. 2d., and reconvey the leases, I will assume them for the future, and thus you will be relieved from further loss arising out of properties which are worth very much less than the cost of them. Referring to our conversation when we met at the station on Saturday, I write as you suggested. The proposition now made is open for ten days, and if you accept my offer, the leases and money should be here within that time. The reason is, that an opportunity occurs just now which may not happen again, whereby I can dispose of the properties in question in a manner that will relieve you from future demands for them without loss to myself."

Mr. M'Lean swore that he sent a copy of this letter to Mr. Brydges with a full report, and was authorized and paid defendant \$2000, and that the defendant was to settle with the plaintiffs the rent mentioned in his letter, at the

same time handing him the leases which had been transferred by him to the railway company, and took from the defendant a receipt as follows :—

“BRANTFORD, 25th *April* 1865.—Received from the Grand Trunk Railway Company, on account of the Buffalo and Lake Huron Railway Company, the sum of two thousand dollars, by draft at ten days' sight, being in full of all claims for leases granted by the Canada Company of lands in South Easthope and Zorra, referred to in an agreement entered into between the Buffalo and Lake Huron Railway and myself, on or about the 31st August 1858; and I hereby discharge the said Buffalo and Lake Huron Railway of all further liability in respect to the said leases under the said agreement.

“(Signed) DONALD M'DONALD.” [L. S.]

Mr. M'Lean stated that the defendant refused to sign a receipt differently worded—that the receipt represented the transaction, and the latter part referred to future accruing rents; that the \$2000 were the rent mentioned in the defendant's letter—that nothing else was discussed; that he had no authority to pay this money except to pay the plaintiffs. He suggested to Mr. Brydges either to pay the plaintiffs or to pay it to the defendant; he understood that the arrangement was made in Quebec with Mr. Wood, the solicitor of the railway company, Mr. Brydges concurring. It was also proved that the railway company had paid rent to the plaintiffs on both these lots up to some time in 1861; that the defendant had repeatedly urged the plaintiffs to look to the railway company for the rent; also that the rents so paid on these lots were portions of the sum of \$22,000 mentioned as the consideration in the indenture of 1858. It was also proved that defendant had conversed with both the Commissioners of the Canada Company on these matters, but had admitted no liability in respect to the Zorra lot, though he proposed to purchase the South Easthope lot, and one of the Commissioners stated that apart from the payment by the Buffalo and Lake Huron Railway Company the plaintiffs never held the defendant liable for the Zorra lot.

On the defence it was objected that the nature of the arrangement made with Mr. Wood in Quebec was not

proved ; that if the receipt contained the agreement it did not support the plaintiffs' case ; no privity.

Mr. Wood was called, and stated that the arrangement was not that this \$2000 was to go to the plaintiffs, but that the defendant was to receive it and relieve the railway company from all future liability on their agreement of 1858 to indemnify him ; that if otherwise the money would have been paid directly to the plaintiffs ; that the object of the railway company was to avoid payment of future rents ; that he told Mr. M'Lean to take the receipt from the defendant so as to discharge the railway company from all future liability on the agreement of 1858 ; that no doubt the basis of this agreement was the plaintiffs' claim for rent ; that he had not the least idea the defendant was to hand this money to the plaintiffs ; the agreement was that the defendant should indemnify the railway company from past and future liability for rent.

The learned judge held that the receipt did not explain the matter so as to exclude all evidence as to the substance of the transaction, and he left the case to the jury, telling them that to enable the plaintiffs to recover, the substance of the affair must be that the money paid to the defendant was so paid to be by him held for and received by the plaintiffs.

The jury gave a verdict for the plaintiffs, damages \$1612.40.

In Hilary term *Robert A. Harrison* obtained a rule to show cause why there should not be a new trial, for misdirection, in not telling the jury that the defence was proved ; that the verdict was contrary to law and evidence and the weight of evidence ; that there was express evidence of the terms or agreement on which the defendant received the money ; that there was no agreement between plaintiffs and defendant that he should receive this money for them or pay it to them ; that there was no proof of any privity between the plaintiffs and the defendant ; and for misdirection, in ruling that on the evidence the plaintiffs were entitled to maintain an action for money had and received, and in not telling

the jury that upon the proper construction of the defendant's receipt, which was produced by the plaintiffs, the consideration for the payment was the discharge by the defendant of the Buffalo and Lake Huron Railway Company from liability in respect of the leases mentioned in that receipt.

J. H. Cameron, Q.C., showed cause. He urged that the want of privity was in no way objected to at the trial, and argued upon the defendant's letter of the 2nd of January 1865, and the receipt taken together, as furnishing ample evidence of the defendant's liability in this action; and that as the defendant had paid part of this money, the rent upon the South Easthope lot, to the plaintiffs, he could not afterwards be heard to deny that he received the whole for their use.

Robert A. Harrison and *Spencer* supported the rule, citing *Ireson v. Mason*, 12 C. P. 475; *Midland R. W. Co. v. Bromley*, 17 C. B. 382; *Barber v. Brown*, 1 C. B. N. S. 121; *Litt v. Martindale*, 18 C. B. 314; *Malcolm v. Scott*, 5 Ex. 601; *Brind v. Hampshire*, 1 M. & W. 365; *Barlowe v. Browne*, 16 M. & W. 126; *Baron v. Husband*, 4 B. & Ad. 611; *Wedlake v. Hurley*, 1 C. & J. 83; *Watson v. Russell*, 3 B. & S. 34; S. C. in Error, 34 L. J. Q. B. 93; *Clarke v. Dickson*, 4 Jur. N. S. 832; *Blackledge v. Harman*, 1 Moo. & Rob. 344; *McCarthy v. Smith, Alcock & Napier*, 69.

DRAPER, C.J., delivered the judgment of the court.

We think this rule must be made absolute. There is a marked distinction between the defendant's position in regard to the lot in South Easthope and that in Zorra. As to the former, there was privity of contract, for the defendant was the lessee of the plaintiffs; as to the latter, it is not established that he was in any character liable to pay rent to the plaintiffs. His payment of the rent on the first is referable to his individual liability, independent of any dealing with the railway company.

The defendant might have been content to indemnify the railway company against past and future rents of both lots on receiving \$2000; and intending to pay the one for which he was legally liable, may have been satisfied to incur the

risk of the plaintiffs being able to recover from the railway company the arrears of rent due upon the other.

The previous payments by the company of the rent of both lots, as well as the defendant's urging the plaintiffs to press them to pay, appear to us consistent with the covenant of the railway company contained in the indenture of 1858. The plaintiff's counsel have not said anything in answer to the objection of want of privity. They only denied that it was taken at the trial; but I understand by the learned judge's note that it was distinctly raised.

We see no ground except the receipt of the money from the railway company by the defendant on which the plaintiffs can hope to recover, and the receipt contains nothing which helps their case. The railway company have obtained a discharge from a liability they were under to the defendant, and we think it a fallacy to say that because the sum they paid was ascertained by the amount of the plaintiffs' claim for rent, therefore it was paid to the defendant for the plaintiffs' use. It is more consistent with the evidence to say that this sum was what the railway company were to indemnify the defendant against, therefore they paid it to him and got his release. They paid it not as the plaintiffs' money, but as the price of their own discharge. If so, we cannot see that it gives the plaintiffs any right to recover. It appears equally a mistake to say that because the defendant after the receipt of this money paid the rent on the South Easthope lot, therefore he must be held to have received the \$2000 on the plaintiffs' account in order to pay both rents. We cannot in any way connect the plaintiffs with the settlement between the railway company and the defendant, so as to hold that this was money received by him to the plaintiffs' use.

We think there should be a new trial, costs to abide the event.

Rule absolute.*

* At the conclusion of this judgment *Harrison* for the defendant urged that the rule should be made absolute without costs, as the new trial was in effect granted for misdirection; but the court said that in their opinion the evidence must go to the jury, and there was no misdirection, though they thought the verdict wrong.

SLAGHT v. WEST ET AL.

Trespass—Seizure under fi. fa.—Evidence to connect execution plaintiffs.

In trespass for seizing goods it appeared that the defendants, who had a claim against one B., instructed their attorney to collect it, and that the attorney having issued execution handed it to the sheriff, informing him that B. lived at Paris, where he kept a fruit-store. The deputy-sheriff said it would be a good time "to make a haul" (being near Christmas), to which the attorney answered that it would; and the seizure was then made. The plaintiff having claimed the goods, the attorney told the sheriff to hold possession, as they wished to make inquiries, and the sheriff did so until an interpleader order issued.

Held, affirming the judgment of the county court, that the defendants were bound by the acts and directions of their attorney, and that there was sufficient evidence to go to the jury to connect them with the seizure.

APPEAL from the County Court of Brant.

The point presented was whether there was any evidence for the jury, on a motion for a nonsuit, to connect the defendants with a trespass to the plaintiff's house and goods.

Defendants were plaintiffs in an execution against one Beare. Their attorney gave the writ to the sheriff, and, as he swore, directed him that Beare lived in Paris, and was carrying on business, selling goods or fruit. A seizure was afterwards made at a shop in Paris where Beare was apparently carrying on business. The plaintiff claimed the shop and goods to be his, and notified the sheriff, who informed the attorneys, and asked should he withdraw, or would they indemnify. They wanted a few days to make inquiry. He let it stand a few days, and they were still unprepared to give definite instructions. The sheriff asked should he withdraw, and understood from them he should not, as they wished to inquire further. He then interpleaded.

The deputy-sheriff swore the sheriff had referred him to the attorneys before executing the writ. One of the attorneys told him that Beare had a fruit-store in Paris. Witness said it would be a good time to make a haul; the attorney said it would. Witness went to Paris that day and found Beare at the store. He denied owning anything. Witness left a man in possession, returned, and told the attorney what had taken place. The attorneys told him to "hang on," and they would inquire about it. Witness did hold on till an interpleader order was obtained.

The learned judge held that there was evidence to go to

the jury, it being objected that defendants, the execution creditors, were not connected with the trespass, and no ratification by them of it was shown, nor authority from them to issue execution. Leave was reserved to move for a nonsuit. The attorney swore somewhat differently from the sheriff and deputy.

It was left to the jury to say if the seizure of the plaintiff's goods was made by direction of the attorneys of the execution plaintiffs, and they were directed that if so the plaintiff should recover; that if the attorneys were instructed to collect the debt, the clients would be bound by their acts in issuing a *fi. fa.* and the instructions therewith.

The jury found for the plaintiff.

In next term a motion for nonsuit was made, wholly on the objections taken at the trial, and after argument the rule was discharged, the following judgment being given in the court below:—

Jones, Co. J.—An attorney's warrant to prosecute an action continues in force (unless countermanded by his death or the act of the principal) for a year and a day after the judgment, for the purpose of having execution (1 Tidd's Prac. 9th ed. p. 93. In *Bevins v. Hulme*, 15 M. & W. 96). The court said that the original retainer is to be presumed *prima facie* to continue after judgment, so as to warrant the attorney in issuing execution within a year and a day, or afterwards in continuation of a former writ of execution issued within that time, and also to warrant his receiving the damages without a writ of execution.

In *Sweetnam v. Lemon et al.* (13 C. P. 534) the court said that the duty of an attorney on a retainer to collect a claim does not necessarily terminate with the entry of judgment, but continues afterwards for the purpose of issuing execution; and if he undertakes to collect his client's money for him, he ought to make the judgment available for that purpose if he can.

Darling v. Weller (22 U. C. R. 363) decides that the ordinary retainer of an attorney does not bind him to register a judgment, nor perhaps to take any collateral proceeding on

the judgment, such as examining the defendants, or garnishing debts, unless specially retained for the purpose; but the courts expressly recognise the liability of the attorney on such a retainer to resort to "all the ordinary execution processes."

In *Jarmain v. Hooper* (6 M. & G. 827), which was an action of trespass against the sheriff and A. for seizing the plaintiff's goods, it was held that A., who was the execution plaintiff, was liable although he had not interfered in any way beyond giving instructions to his attorney to sue the defendant in the original action. The court said: "The direction given by the attorney to the sheriff to seize is a direction given by an agent within the scope of his authority. . . . The attorney has the general conduct of the cause; he is the only person with whom the sheriff has communication; and in taking a step essentially necessary for the benefit of the client, that is, for the obtaining the fruit of his judgment, we think he cannot be held to have acted beyond his authority though he has miscarried in its execution. . . . The client must stand to the consequences if he act inadvertently or ignorantly." (See also *Collett v. Foster*, 2 H. & N. 358.)

The case of *Childers v. Wooler* (2 E. & E. 286) is not, I think, in point, nor does it, as it was argued here, at all shake the case of *Jarmain v. Hooper*.

The evidence given by Mr. J. B. M'Mahon was that his firm were employed in collecting claims for the defendants, and he presumed they were instructed to collect this debt. This was one of the questions left to the jury, and they would be justified on this evidence in finding that Mr. M'Mahon was so instructed. Then if instructed to collect the debt, the above decisions satisfy me that this was a sufficient authority from the defendants for them to issue the execution, and their acts after the execution was issued would be done as agents for the defendants. I think, therefore, that the defendants' rule fails as to the first and third grounds stated therein.*

* These grounds were, that the evidence did not connect defendants with the seizure, and that there was no evidence of authority from defendants to their attorney to issue the *fi. fa.*

The second objection raised is that there was no ratification by the defendants or their attorneys of the seizure made by the sheriff. If the defendants or their attorneys did not authorize the sheriff to make the seizure, no subsequent ratification by them of his act would, I think, make them liable. See *Wilson v. Tumman* (6 M. & G. 243), *Woollen v. Wright* (1 H. & C. 534), and *Kennedy v. Patterson* (22 U. C. R. 556). But in the present case there was evidence in my opinion to go to the jury that the attorneys for the defendants directed the seizure to be made; and it must be remembered that this was a motion to enter a nonsuit; and if there is evidence to sustain the verdict the rule must be discharged, although the verdict might be against the weight of evidence. The deputy-sheriff, C. E. Smith, who had the writ to execute, in his evidence stated as follows: "I saw one of the Mr. M'Mahons at the sheriff's request, who had referred me to him for instructions (this subsequently appeared to have been Mr. H. M'Mahon). He told me the defendant William Beare had a fruit-store in Paris. I said it would be a good time (near Christmas) to make a haul; he said it would." The deputy-sheriff then went up the same day, and levied on the goods in the fruit-store, for which this action is brought. In my opinion this was evidence to go to the jury that the attorney directed these goods to be seized.

From this judgment the defendants appealed.

Moss, for the appellant, cited *Jarmain v. Hooper*, 6 M. & G. 827; *Sowell v. Champion*, 6 A. E. 407; *Rowles v. Senior*, 8 Q. B. 677; *Collett v. Foster*, 2 H. & N. 356; *Childers v. Wooler*, 2 E. & E. 307, 313, 314; *Cronshaw v. Chayman*, 7 H. & N. 911; *Williams v. Smith*, 14 C. B. N. S. 596; *Kennedy v. Patterson*, 22 U. C. R. 556; *Sweetnam v. Lemon et al.*, 13 C. P. 541; *Whitmore v. Green*, 13 M. & W. 109; *Woollen v. Wright*, 1 H. & C. 554. *Fitch*, contra, cited *Barker v. St. Quintin*, 12 M. W. 441; *Wilson v. Tumman*, 6 M. & G. 241; *Radenhurst v. M'Lean*, 4 O. S. 281; *Cameron v. Lount*, 4 U. C. R. 275; *Grant v. Wilson*, 17 U. C. R. 148; *Gray v. Fortune et al.*, 18 U. C.

R. 253; *Walker v. Hunter*, 2 C. B. 323; *Tilt v. Jarvis*, 5 C. P. 486.

HAGARTY, J., delivered the judgment of the court.

It is unnecessary to discuss any view of the law not expressly arising on this motion. Unless the judge should have nonsuited the appeal fails.

It seems to us that the learned judge decided correctly, and that he was bound to leave the case to the jury, and we are satisfied with his reasons in his carefully-prepared judgment.

Some points urged by Mr. Moss and naturally suggested by the cases cited were not raised below; for example, whether any subsequent ratification of a wrongful act of this kind is available. We are also not called on to decide a point noticed in *Childers v. Wooler* (2 E. & E. 316) as to the liability ceasing from the time that the sheriff became aware he was acting illegally. We only mention these to remark that the form of appeal does not render their decision necessary.

It was proved that this plaintiff, Slaght, had rented the shop, in which fruit was sold, and the suit is for breaking and entering and selling the goods. Beare swore he was there merely as the plaintiff's agent. If the jury believed that the attorneys instructed the sheriff, as was sworn, that Beare kept a fruit-store in Paris, and that it would be a good time to make a haul, that, coupled with the other evidence, seems necessarily proper to submit to a jury on the question whether the defendants through their attorneys joined in or caused the trespass on the shop, where, in our view of the evidence, the plaintiff, and not Beare, kept a fruit-store, etc. *Kennedy v. Patterson*, in this court (22 U. C. R. 563), is in point.

There is a wide distinction between this and one or two of the cases cited by Mr. Moss, where the sheriff sued the attorney for an alleged false representation or direction as to the ownership of goods, on which the sheriff acted, and had to pay damages to the true owner.

The case of *Walker v. Olding* (1 H. & C. 621, 9 Jur.

N. S. 53, in 1862) seems to assume the execution plaintiffs' liability in trespass on a direction given by their attorney. That defendants are answerable for the acts of their attorneys in the ordinary enforcement of execution process and directions as to action thereon seems to be reasonably clear. See *Jarmain v. Hooper* (6 M. & G. 827), where the law is reviewed by *Tindal C.J.*

At present we are not prepared to say that there was no evidence proper to be submitted to the jury, and therefore we dismiss the appeal with costs.

Appeal dismissed, with costs.

ROSS v. GRANGE, SHERIFF.

Action for not levying—Destruction of goods by fire—Pleading.

Declaration, against a sheriff for not executing a *fi. fa.*, alleging that there were goods out of which he could have levied the money indorsed, but that he did not levy the same. *Plea*, that before he could by due diligence have levied the moneys the goods were destroyed by fire.

Held, on demurrer, plea bad, for levying includes seizure and sale, and consistently with the plea the goods might have been destroyed in defendant's custody after seizure, in which case he would be liable.

ACTION against the sheriff for not levying under a *fi. fa.*

The declaration was in the ordinary form, averring that at the time of the delivery of the *fi. fa.* to the defendant divers goods and chattels of the judgment debtor to the amount of the moneys indorsed and directed to be levied were in the defendant's bailiwick; and that he, the defendant, might and could, and ought to have levied and made thereout the money and interest indorsed on the said writ, yet he did not nor would levy the said money, but made default in the execution of the said writ, whereby, etc.

To this the defendant pleaded that he did proceed to execute the said writ, and did endeavour with all reasonable diligence to levy the money and interest on the said writ indorsed, as by the said writ he was commanded to do; and that after the delivery of the said writ to the defendant, as in the declaration alleged, and before the defendant could by due diligence have levied the moneys and interest on the said writ indorsed, the said goods were destroyed by fire.

Demurrer, on the following, among other grounds:—

1. Because the said plea does not state that the defendant endeavoured to seize the said goods and chattels, and that before he could by due diligence have seized them such goods and chattels were destroyed by fire.

2. Because the said plea is ambiguous and uncertain, in that it only states that the goods in the declaration mentioned were destroyed by fire before the defendant could by due diligence have levied the moneys and interest on the said writ indorsed, and does not state whether the said goods were so destroyed before the defendant could by due diligence have seized and taken the same in execution under the said writ.

M'Michael, for the demurrer, cited *Drewe v. Lainson*, 11 A. E. 529; *Sly v. Finch*, Cro. Jac. 514; *Barrow v. Bell*, 5 E. & B. 540; *Playfair v. Musgrove*, 14 M. & W. 246; *Mildmay v. Smith*, 2 Saund. 343.

C. Robinson, Q.C., contra.

MORRISON, J., delivered the judgment of the court.

The question turns upon the meaning of the words "have levied the moneys and interest indorsed" in the concluding part of the plea. The case of *Drewe v. Lainson* (11 A. & E. 538) shows that those words include two acts on the part of the sheriff, a seizure of the goods and a sale; and our C. L. P. Act, section 253, prohibits the sale of any goods seized by the sheriff under an execution until after eight days' public notice, so that before a sheriff can levy moneys under a *fi. fa.* goods there must be a seizure, and at least eight days intervening.

It is quite consistent with the plea that the defendant had seized the goods mentioned in the declaration, and that while they were in his custody they were destroyed by fire. If the sheriff seize goods he is liable for them, no matter what becomes of them, and whether he sells or not the judgment debtor after a seizure is discharged as to the plaintiff, and he is not liable to a second execution, and he may plead the taking in discharge of himself (*Bac. Abr.*

"Execution" D. and cases cited; Clerk *v.* Withers, 2 Ld. Raym. 1074).

Judgment for the plaintiff on demurrer.

DONNELLY ET AL. *v.* STEWART.

Held, affirming the judgment of the County Court, and following M'Pherson *v.* Forrester, 11 U. C. R. 362, that an action would not lie in a County Court upon a Division Court judgment.

APPEAL from the County Court of the County of Hastings.

This was an action brought on a judgment recovered in the ninth Division Court of the County of Hastings.

At the trial it was objected that the action would not lie, and upon this objection the learned judge made a rule absolute in term to enter a nonsuit, holding the case to be governed by M'Pherson *v.* Forrester, 11 U. C. R. 362.

The plaintiff thereupon appealed.

Ponton, for the appellant, cited Williams *v.* Jones, 13 M. & W. 628; Reynolds *v.* Talmon, 2 Q. B. 644; Adams *v.* Ready, 6 H. & N. 264; Slater *v.* MacKay, 8 C. B. 556; Albon *v.* Pyke, 4 M. & G. 421; Cates *qui tam v.* Knight, 3 T. R. 442.

Hector Cameron, contra, relied on M'Pherson *v.* Forrester, 11 U. C. R. 362; and Berkeley *v.* Elderkin, 1 E. & B. 806.

HAGARTY, J., delivered the judgment of the court.

The chief point raised on this appeal is whether an action can be brought in the County Court on a Division Court judgment. This court, in M'Pherson *v.* Forrester (11 U. C. R. 362), decided in 1853, on demurrer, that an action would not lie on a Division Court judgment, and the language equally points to any higher court (as, *e.g.* the County Court) as to the superior courts.

This case was not appealed, and has apparently remained unquestioned thirteen years. As our decision in this appeal is final, we may not be necessarily bound by the case cited, but we should not depart from it except on the strongest grounds. There it was held that the provisions of the Division Court Acts for enforcing judgment would be interfered with if the plaintiff there could at once go into a

higher court and sue on the judgment. The court relied much on the decision in *Berkeley v. Elderkin* (1 E. & B. 808). Some of the reasons there given may not exactly apply to our execution process against goods in Upper Canada; but *Lord Campbell* points out one ground common to both systems: "Section 100" (like our section 170, Consol. Stat. U. C. ch. 19) "enacts 'that it shall be lawful for the judge, etc., if he think fit, whether or not he shall make any order for the committal of the defendant, to rescind or alter any order that shall have been previously made against any defendant so summoned before him, for payment by instalments or otherwise, of any debt or damages recovered, and to make any further or other order, either for the payment of the whole of such debt, or damages and costs, forthwith, or by any instalments, or in any other manner, as such judge may think reasonable and just.' This shows," he says, "that there is nothing in the nature of a final judgment in the County" (Division) "Court. The judge has still jurisdiction over this very judgment on which this action is brought. He might now rescind or alter it, and make a new order to pay by instalments, or at any other time. That power given to the judge would be defeated if this action lay. . . . I rejoice that we are able to come to this conclusion by the established rules of law; for there can be no doubt that it is most desirable that such actions should not lie. . . . Where new rights are given with specific remedies, the remedy is confined to those specifically given."

Another section of our Act, 108, allows the judges in case of sickness or other sufficient cause to suspend or stay a judgment.

There seems no doubt that a defendant sued in the higher court would lose several important advantages allowed him in the Division Courts.

We are not prepared to dissent from the reasoning of this English case, followed as it was by this court; and we dismiss the appeal with costs.

Appeal dismissed, with costs.

RICHARDS *v.* THE LIVERPOOL AND LONDON FIRE AND
LIFE INSURANCE COMPANY.*Insurance—Interest—Mortgagor and Mortgagee.*

Declaration on a policy of insurance, effected by the plaintiff with the defendants, alleging that he sued on behalf of and as trustee for one D., to whom he had mortgaged the premises and assigned the policy. *Demurrer*, because the plaintiff shows no interest in the premises, and having none cannot sue as trustee for another. *Held*, that the objections were clearly untenable.

DECLARATION upon a policy of insurance on a house for \$600, effected by the defendants with the plaintiff, who it was alleged "brings this action for and on account of and as trustee for H. D."

After setting out the policy, it was averred that before the making thereof the plaintiff mortgaged the premises insured to the said H. D. for \$700, which was still unpaid; that after effecting the policy the plaintiff assigned it to the said H. D., who thereby became and is the holder thereof, of which assignment the defendants had notice, for whose benefit and on whose account the plaintiff brings this suit. The destruction of the premises, by which the plaintiff sustained damage and loss to the amount insured, was then alleged, and non-payment by the defendants.

Demurrer, on the ground that it appears that the plaintiff has no interest in the premises insured, but that all interest has passed out of him; and that he cannot as trustee for another, having himself no interest in the subject-matter of the insurance, sustain this action.

M. C. Cameron, Q.C., and *M. Michael*, for the demurrer, cited *Dunlop v. Ætna Insurance Co.*, 2 C. P. 252; *Ogden v. The Montreal Insurance Co.*, 3 C. P. 497; *Beemer v. The Anchor Insurance Co.*, 16 U. C. R. 485; *Park v. The Phoenix Insurance Co.*, 19 U. C. R. 110.

Galt, Q.C., and *Lauder*, contra, cited *Marks v. Hamilton*, 16 Jur. 152, 7 Ex. 323.

MORRISON, J., delivered the judgment of the court.

The declaration is objected to on two grounds: 1. That

on the face of it the plaintiff shows he has no interest in the premises insured; and, 2, that the plaintiff cannot as trustee for another sustain the action, he having parted with his interest in the premises.

We see nothing in the last objection. The policy of insurance being a chose in action is not assignable, but the interest of the insured in the policy is transferable if regularly assigned, and in that case the action must be brought on behalf of the assignee, in the name (as in this case) of the original party insured (*Beemer v. The Anchor Insurance Company*, 16 U. C. R. 485; *Davies v. The Home Insurance Company*, 24 U. C. R. 364).

As to the objection of the want of interest. It appears by the declaration that at the time of effecting the policy of insurance and the assignment thereof, the plaintiff was the mortgagor of the premises in question, and it also appears that the assignee of the policy, for whose benefit this action is brought, was the mortgagee of the premises at the time of the making of the policy and of the assignment, and when the loss took place. It is unnecessary to cite cases to establish that both the mortgagor and mortgagee have an insurable interest. (See *Ogden v. The Montreal Insurance Company*, where the authorities are all referred to.)

Judgment for the plaintiff on demurrer.

JACQUES ET AL. v. NICHOLL.

Collision—Canal regulations—Breach of—Pleading.

The declaration set out certain regulations, made in pursuance of the statute, for the proper use of the Welland Canal, directing that boats waiting to enter a lock should lie in single tier and advance in the order in which they lay; and that all vessels approaching a lock, while any other vessel going in a contrary direction was about to enter it, should be stopped and made fast as directed, and remain there until such vessel should have passed under a penalty named. It then alleged that the defendant's vessel, which was waiting to enter a lock with two other vessels, passed them out of its order, and endeavoured to enter first, and while it was so approaching the plaintiffs' steamboat, going in a contrary direction, was in the lock; but defendant did not stop or make fast his vessel, but wrongfully, and in violation of the regulations, went on and endeavoured to enter the lock, whereby it was driven against the plaintiffs' boat, which was forced against the side of the lock and injured.

Held, on demurrer, declaration bad, for the contravention of the regulations formed no cause of action, and no negligence on the defendant's part was alleged.

DECLARATION, that the Welland Canal was and is one of the public works of this province; and his Excellency the Governor-General of this province, in pursuance of the statute in such case made and provided, enacted certain regulations for the proper use of the said canal, and other provincial canals, of which the defendant had notice, and amongst other such regulations it was so enacted, that when several boats or vessels should be lying by or in waiting to enter any lock, they should lie in single tier, and at a distance of not less than three hundred feet from such lock, under a penalty of not less than twenty shillings or more than ten pounds, and that all such boats or vessels should advance to pass a lock in the order in which they lay in such tier (except in the case of steamboats carrying Her Majesty's mail or passengers only, to which priority of passage should at all times be given); and further, that all vessels and boats approaching a lock while any other vessel going in a contrary direction was in or about to enter the same, should be stopped and made fast to the posts placed for that purpose on the off side from the trackway, and remain there until the vessel going through the lock should have passed, under a penalty for every such offence of not less than twenty shillings nor more than five pounds; and that a vessel of the defendant's, not being a steamboat, and not carrying Her Majesty's mail or passengers only, was

in the said canal, and was waiting to enter a lock, and two other vessels, named respectively the *Caroline* and the *Gary Owen*, were also in the said canal and waiting to enter the said lock, and the said vessel of the defendant and the said other two vessels were in single tier, and the said vessel of the defendant was further from the said lock in the order in which she lay in such tier than either of the said other two vessels ; but the defendant did not and would not advance to pass the said lock in the order in which his said vessel so lay in such tier, but removed his said vessel out of such tier, and passed the said other two vessels, and approached the said lock in advance of the other two vessels, and endeavoured to enter the lock in advance of the same ; and while the defendant was so approaching the said lock with his said vessel, the steamboat of the plaintiffs' called the *St. Lawrence*, going in a contrary direction to the said vessel of the defendant, was in the said lock, and was going through the same, as the defendant well knew, yet the defendant did not and would not stop his said vessel, or make the same fast to the posts placed for that purpose on the off side from the trackway, or remain there until the said steamboat of the plaintiffs had passed, but wrongfully, and in violation of the said regulations, continued to approach the said lock with his said vessel, and endeavoured to enter the said lock with the same, whereby the same was driven against the said steamboat of the plaintiffs, whereby the said steamboat was forced and driven against the side of the said lock, and was greatly damaged, broken, and injured ; and the plaintiffs were put to great expense in repairing such damage, and lost the use and profit of their said steamboat for a long time, and were at great expense in the maintenance and hire of the crew of the said steamboat, while the same was necessarily detained in undergoing repairs, and were otherwise damaged.

Demurrer, on the grounds that the declaration shows for the offence alleged that the defendant was liable to a penalty, but it is not stated to whom or in what manner the penalty is payable or recoverable ; that there is no alleged negligence charged or any direct trespass, and

so no cause of action shown or averred; that by law the penalty referred to is payable to Her Majesty, and not to the plaintiffs.

M. C. Cameron, Q.C., for the demurrer, cited *Vennall v. Garner*, 1 C. & M. 21.

C. S. Patterson, contra, cited *Barnes v. Ward*, 9 C. B. 392; *The General Steam Navigation Company v. Morrison*, 13 C. B. 581; *Taylor v. Crowland Gas Co.*, 10 Ex. 293; *Couch v. Steel*, 3 E. & B. 402; *Bromage v. Prosser*, 4 B. & C. 247.

MORRISON, J., delivered the judgment of the court.

We are of opinion that the defendant is entitled to our judgment.

It was not contended by the plaintiffs' counsel on the argument that the cause of action rested on the contravention of the regulations *per se*. The count alleges that under certain regulations vessels waiting to enter a lock on the Welland Canal should lie in a particular order and pass in their turn, and that when vessels were approaching a lock while another vessel, coming in the contrary direction, was in or about to enter the same lock, the approaching vessel should be stopped and made fast, etc., until the other passed, under a penalty of not more than five pounds. It further alleges that the defendant's vessel, in contravention of the regulations, passed out of her order and approached the lock, whilst the plaintiffs' steamboat was in the lock and going through, and that the defendant did not stop and make fast his vessel, etc., until the plaintiffs' steamboat passed, but wrongfully and in violation of the regulations approached the lock with his vessel and endeavoured to enter the lock, whereby the same was driven against the plaintiffs' steamboat, whereby the plaintiffs' steamboat was forced and driven against the lock, and was damaged and injured, etc.

It is not averred that the defendant improperly and negligently navigated his vessel and caused the injury, or that he wilfully ran her against the plaintiffs' steamboat.

It is quite consistent with the facts stated that the defendant used every care with his vessel in approaching the lock and entering it, and notwithstanding the approach and entrance of the defendant's vessel that the plaintiffs' steamboat might have passed through and out of the lock without injury; and for all that appears in the count, the injury sustained by the plaintiffs' vessel may have been occasioned by the default and neglect of the persons in charge of her, admitting the infringement of the regulations by the defendant's vessel.

If the plaintiffs contributed to the occurrence of the injury they sustained through their own default or neglect, or through the reckless management of their steamboat brought her into collision with the defendant's vessel, and so caused the damage complained of, no action would lie. The bare infringement of the regulations as set out in the count would not of itself give any cause of action to the plaintiffs. It does not appear by whom or against whom the penalty is to be recovered, or to whom it is to be paid, or in what way applied. I refer to the *General Steam Navigation Co. v. Morrison* (13 C. B. 581), *Dowell v. The General Steam Navigation Co.* (5 E. & B. 195), *Morrison v. The General Steam Navigation Co.* (8 Ex. 733).

Judgment for defendant on demurrer.

CAYLEY ET AL. v. FOSTER.

Sale for taxes—6 Geo. IV. ch. 7—Description of land.

Held, that a description in the sheriff's deed of land sold for taxes under 6 Geo. IV. ch. 7, as "twenty-five acres of lot 31, in the twelfth concession of the township of King," was insufficient.

EJECTMENT for land described in the writ as "part of lot number 31, in the twelfth concession of King, being twenty-five acres off the south-east corner of the lot, which was bought at sheriff's sale for taxes on the 31st December 1831 by the late D'Arcy Boulton, and described in memorial No. 9130 in the then registry office of the county of York."

Defence by Ann Barker as landlady of George Foster,

who defends for part, *i.e.* 24 acres, butted and bounded as follows: Commencing at the south-east angle of the lot; then south 74° west 34 ch. 64 links; then north 9° west 6 chains, 92 links; then north 74° east to the easterly limit of said lot; then south 9° east to the place of beginning.

The plaintiffs' claim of title was under a mortgage from Arthur Armstrong and wife to the late Sarah Anne Boulton, dated the 19th of December 1860, in payment of which default had been made, and under the will of Sarah Anne Boulton.

The defendant (or rather the landlady Ann Barker) claimed title under a deed from Charles Smith and wife, dated 17th December 1857, described as in the appearance, and (by judge's order) by twenty years' possession by herself and those under whom she claimed.

The trial took place at the assizes for York and Peel in January last, before *Hagarty, J.*

It was proved for the plaintiffs that the taxes on this lot being in arrear for eight years, a sale was duly made, and on the 31st of December 1831 the sheriff conveyed to D'Arcy Boulton twenty-five acres thereof. The description in the deed was "twenty-five acres of lot number 31 in the twelfth concession of the said township of King." A surveyor was called, who stated that the lots in King numbered from south to north, and that the south-east was the front angle of this lot.

The statute of Upper Canada, 6 Geo. IV. ch. 7, sec. 13, required the sheriff to expose the lots for sale in the following manner: To begin at the front angle, on that side from whence the lots were numbered, and to measure backward, taking a proportion of the width corresponding in quantity with the proportion of such particular lot in regard to its length and breadth, according to the quantity required. The surveyor stated that following this direction the twenty-five acres would extend 35 chains 35 links towards the rear on the side line, and 7 chains 7 links in width, or along the front, and that this would include the twenty-four acres as described in the defendant's appearance.

Title was deduced from D'Arcy Boulton to the plaintiffs

as devisees of the late Sarah Anne Boulton, his widow, who had sold and conveyed to Arthur Armstrong, taking back a mortgage to secure payment of a sum of money, which was overdue and unpaid.

On the defence it was proved that in 1836 the whole of this lot was again returned in arrear for eight years' taxes, the first sale having been for eight years' taxes due in 1828. No distinction as to the taxes in arrear for the second eight years was made between the twenty-five acres sold and the residue of the lot. On the 7th of October 1840 a sale was made for these last arrears, and the sheriff on the 8th of October 1841 conveyed twenty-four acres to the purchaser, described as already set out in the appearance. The defendant deduced title from the purchaser, but failed in proving twenty years' possession.

The learned judge directed a verdict for the defendant with leave reserved to the plaintiffs to enter a verdict for them, if on the evidence the court should think them entitled to recover, or to change the verdict for the defendant into a nonsuit.

In Hilary term *Burns* obtained a rule on the leave reserved, or for a new trial on the ground of misdirection, in telling the jury that the deed from the late sheriff Jarvis was void for uncertainty.

Read, Q.C., showed cause, citing *Dwarris* on Statutes, 579, 611; *M'Intyre v. Great Western R. W. Co.*, 17 U. C. R. 123; *Laughtenborough v. M'Lean*, 14 C. P. 175; *Fraser v. Mattice*, 19 U. C. R. 150.

M. C. Cameron, Q.C., and *Burns* supported the rule.

DRAPER, C.J., delivered the judgment of the court.

The principal question is the sufficiency of the deed of the 31st of December 1831 from the then sheriff of the county of York to the late D'Arcy Boulton, Esquire. The statute which prescribed the sheriff's duty (sec. 13) is to the following effect: The sheriff shall expose to sale the several lots of land in the warrant mentioned in the following manner: "He shall begin at the front angle on that side from

whence the lots are numbered, and measure backward, taking a proportion of the width corresponding in quantity with the proportion of such particular lot in regard to its length and breadth, according to the quantity required to make the sum demanded ; and at every subsequent sale of a portion of the same lot under this Act, shall proceed to take a tract of equal width as the former, measuring backward from the limit of the tract last sold."

The 12th section regulated the mode of sale, which was to be by public auction. The amount of taxes due was to be declared, as well as of the expenses attending the writ, and the person who offered to pay those amounts for the least quantity of the lands on which they were charged was to be considered the purchaser of such quantity. This explains the words in the 13th section, "the quantity required to make the sum demanded."

There is a form of conveyance by the sheriff, which section 18 declares *may be* followed, "or as near thereto as may be." In it, after the statement of the sale these words are inserted in brackets, "describe the parcel of land sold," and this form is exactly followed, giving as the description of these twenty-five acres "twenty-five acres of lot number 31, in the twelfth concession of the said township of King."

The 14th section of the statute authorizes the sheriff, when from the position or description of the tract the mode directed in the 13th section cannot be followed, in his discretion to expose to sale such portion thereof as shall appear to him most for the interest of the proprietor thereof.

The case of *Fraser v. Mattice* (19 U. C. R. 150) appears to us to be decisive. There the sheriff on the 15th of August 1851 made a deed founded on a sale for taxes made in 1846, describing the land sold as all that parcel of land situate in the township of O., and composed of twenty-five acres of lot number 15, in the seventh concession of the said township. The Chief Justice said the court could not hold that the deed gave any information, for the sheriff had not stated that he sold twenty-five acres to be taken out of the lot according to the general direction of the statute, nor did he state in any way what land he had sold ; and adds, "It

has been argued that the sheriff having given no information of any other method of measurement than that prescribed by 6 Geo. IV. ch. 7, we may infer that he did sell twenty-five acres to be so measured. But we think he should at least have said so, and that to hold this deed to be sufficient would be to countenance too great a degree of irregularity, and would be contrary to the policy of the law and the evident intention of the legislature." This is applicable in every respect to the present case. In *M'Intyre v. The Great Western R. W. Co.* (17 U. C. R. 118) the description was in the very words of the 13th section of the 6 Geo. IV., and the court held that to be sufficient. The case of *M'Donell v. M'Donald* (24 U. C. R. 74) arose under a later statute, but the principle of it sustains the defence.

Being of this opinion, it follows that the plaintiffs have not shown a right of possession to the land defended for, and it is unnecessary to examine the defendant's title. In view of the last part of section 13 above quoted, there may be very serious difficulties found in attempting to sustain it, if the twenty-five acres mentioned in the deed had been described either in the words or according to the intent and meaning of the former part of this section.

Rule discharged.

IN RE DOHERTY AND THE CORPORATION OF THE TOWNSHIP OF TORONTO.

Common Schools—Loan by Township to school section—C. S. U. C. ch. 64, sec. 35.

A township corporation passed a by-law reciting that by section 35 of the Upper Canada Common School Act authority is given to township councils to collect by special rate in school sections that had become indebted to them by loan, and that a certain section had borrowed of the municipality \$400 due at different days; and enacting that there should be levied in the section by the collector of the municipality the sum of \$262 to meet a certain portion of said loan.

The by-law was quashed, for (among other objections) the statute referred to gives no such authority; and if it did, it requires provision to be made for levying the whole sum borrowed.

The money was said to have been lent out of the Clergy Reserve funds of the township, and 27 Vict. ch. 19, was referred to as authorizing it, but that statute was passed after the loan.

Robert A. Harrison during last Michaelmas term obtained a rule *nisi*, calling upon the corporation of the

township of Toronto to show cause why by-law No. 185 of that municipality should not be quashed for illegality, with costs.

The by-law was in the following words:—

By-Law No. 185.

To levy a certain sum on school section No. 11 in Toronto township for the purpose of meeting a certain loan made to that corporation on the 27th of December 1862.

Whereas by the 35th clause of the Consolidated Statutes Upper Canada, chapter 64, authority is given to township councils to raise, levy, and collect by special rate on school sections that have become indebted to them by loan. And whereas school section No. 11 did on the 27th of December 1862, by resolution bearing date the 27th of December 1862, borrow of this municipality the sum of \$400 on the above condition, bearing interest at the rate of six per cent. per annum. And whereas the same was granted in two sums of \$200 each, one due on the 1st day of January, 1865, and one on the 1st day of January 1866. Wherefore the corporation of the township of Toronto enacts that there be raised, levied, and collected from the ratable property of school section No. 11, in this township, in addition to all other rates and assessments for the current year, the sum of \$262, which said sum shall be collected by the collector of this municipality, and paid over to the treasurer to meet a certain portion of said loan made to the school section No. 11 on the 27th of December 1862, amounting to the sum of \$400 and interest, due on the 1st day of January 1865. Passed August 19th, 1865.

(Signed) JAMES E. RUTLEGE, Town Clerk.

SAMUEL PRICE, Town Reeve.

On the application affidavits were filed for the purpose of showing the illegality of the proceedings of the trustees and the municipality antecedent to the passing of the by-law; but as the judgment is rested upon defects in the by-law itself, it is unnecessary to notice such objections.

The objections made to the by-law were—(1) That the corporation had no authority to lend the moneys of the

township to the school trustees; (2) that section 35 of the U. C. Common School Act conferred no such authority as that recited in the by-law; and (3) if it did, the by-law should have provided for levying a sum sufficient to pay off the whole of the principal and interest, and not merely a sum to cover a portion of the principal and interest.

During this term *M. C. Cameron, Q.C.*, showed cause.
Robert A. Harrison supported the rule.

MORRISON, J., delivered the judgment of the court.

The by-law professes on its face to have been passed under the authority of the 35th section of the Common School Act, ch. 64, Consol. Stat. U. C. On referring to that section it enacts that a township council may grant to the trustees of any school section, on their application, authority to borrow any sums of money necessary for the purposes above mentioned (in sec. 34), in respect to school sites, etc., and in that event shall cause to be levied in each year upon the taxable property in the section a sufficient sum for the payment of the interest on the sum so borrowed, and a sum sufficient to pay off the principal within ten years.

The by-law recites this clause as giving the councils authority to levy and collect by special rate in school sections that have become indebted to them by loan. The clause contains no such authority, and one can hardly understand how any one having the statute before him could put such a construction on the section.

The by-law further recites that school section No. 11 did, on the 27th of December 1862, borrow of the municipality the sum of \$400 *on the above condition*. What is meant or intended by the above condition we cannot make out; and after stating in what manner the \$400 are to be repaid, the by-law enacts that there be raised, etc., from the ratable property of school section No. 11 the sum of \$262 to meet a certain portion of the loan made on the 27th of December 1862, amounting to \$400 and interest, due on the 1st of January 1865. What certain portion

this refers to does not appear, or for what amount of principal or interest.

On the face of the by-law no authority appears for the loan made by the municipality in 1862 to the school section, nor was any authority by statute or otherwise cited or referred to in the argument authorizing any such loan. It does not even appear by the by-law that it was a loan for any school purpose, or for what purpose it was made, or upon whose application.

The only affidavit filed on the part of the municipality is that of Mr. Parker, the now deputy reeve of the township, who states that he was reeve of the township at the time the loan of \$400, in 1862, to the trustees was made; and that as far as he was aware he had no knowledge that there was any difficulty between the ratepayers of the section and the school trustees, although subsequent circumstances indicated that one of the council might have known that there was. How or under what circumstances the loan was made he does not state, although his attention must have been drawn to the affidavits filed on the application, showing the loan was asked for on the personal responsibility of two of the then trustees, and granted on giving notes of hand, signed by them, for the amount.

Mr. Parker further states that the loan was made to the trustees out of the Clergy Reserve funds of the township. With reference to this latter statement, it was mentioned during the argument by the counsel for the municipality that the corporation had authority to apply the Clergy Reserve funds for educational purposes, and to lend such funds to school sections; and it was argued that the loan in question being made by the township council out of their own Clergy Reserve funds to the trustees, such a proceeding was in effect giving to the trustees authority to borrow the amount loaned to them under the provisions of the 35th section of the School Act; but on referring to the statute 27 Vict. ch. 17, which gives the authority to township councils to loan surplus moneys derived from the Clergy Reserve fund to school sections, and also authorizes trustees to borrow such moneys for purchasing school sites, etc

we find that statute was not passed until the 15th of October 1863, while the loan in this case was made on the 27th of December 1862, near a year before the passing of the Act, and consequently not under the authority of that Act.

As to the third objection, the legislature wisely enacted, and made it compulsory by the 35th section of the School Act upon township councils, in the event of their granting authority to school sections to borrow money for any of the purposes referred to, that the township council should also provide the means for securing repayment of the amount borrowed by the levying in each year through their own collector, by a special rate on the taxable property in the school section, sums sufficient to pay off the interest and principal within ten years. In the present case the by-law only provides for the levying of a sum to pay off a portion of the principal and interest, and no provision is made for payment of the balance.

Upon these several grounds we are of opinion the by-law should be quashed with costs.

Rule absolute.

FARQUHARSON v. KNIGHT.

Crown lands—Licences to cut timber.

C. S. C. ch. 23, sec. 1, enacts that the Commissioner of Crown Lands, "or any agent under him authorized to that effect," may grant licences to cut timber. *Held*, that a person appointed "the agent for crown timber for the western division of Upper Canada" had not as such any power to grant these licences.

A licence to cut was granted to the plaintiff on the 22nd of November 1865. On the 6th of December defendant purchased the land, taking a receipt in full from the bank agent at Chatham. On the 14th he obtained a receipt from the Commissioner of Crown Lands, and on the 6th of February 1866 a patent issued to him. *Held*, that if the licence had been duly authorized, it would not have been revoked by the defendant's purchase until the issuing of the patent.

REPLEVIN for eighty pieces of square white oak and eighty white oak timber-trees.

Pleas—1. Not guilty. 2. The timber and trees were the goods of the defendant, and not of the plaintiff.

The case was tried at Sandwich in April last before *Morrison, J.*

The plaintiff called John R. Nash, Esquire, the agent for

crown timber for the western division of Upper Canada, who produced his commission or authority, dated Quebec, 28th June 1864, and which was in the following words: "Mr. John R. Nash is hereby appointed to the office of Crown Timber Agent for western division, U. C., in succession to Mr. Powell, resigned, at a salary of £250 per annum, exclusive of travelling expenses and office expenses. Mr. Nash will report himself to the Assistant Commissioner to-morrow. Crown Lands Department. (Signed) A. CAMPBELL.

Under this authority Mr. Nash, on the 22nd of November 1865, gave an instrument, signed by himself, setting out that he gave to the plaintiff and his agents and workmen full power and licence to cut every description of timber and saw logs on several named lots of land, including lot 24 in the 4th concession of the township of Romney, with certain exceptions, from the date to the 30th of April 1866, and no longer, with the right of conveying away the said timber through any ungranted or waste lands of the crown. Among the exceptions was this, "that any persons settling under lawful authority or title within the location hereby licensed shall not in any way be interrupted by the said licentiate or any one acting for him or by his permission. And further, under condition that the said licentiate or his representatives shall comply with all regulations that are or may be established by order in council, and shall submit all the timber cut under this licence to be counted or measured, and settle for the duties chargeable thereon when required by me or any other officer thereunto authorized, otherwise the said timber will be forfeited to the crown, and the said licentiate be subject to such other penalty or penalties as the Acts provide." Under the signature of Mr. Nash was "Ground-rent payable on giving this licence, \$4."

The lot was a vacant crown lot when this licence was granted. In December 1865 the plaintiff opened out some roads for the purpose of getting timber out from this and other lands, and built a shanty, and in January he made eleven pieces of timber on this lot. The defendant about the same time made timber on this lot; in all there were

eighty pieces, seventy-nine of which the defendant hauled to Lake Erie, where they were taken under the writ of replevin; they had all been marked with the plaintiff's initials, J. F. Plaintiff had forbidden the defendant to take away the timber.

For the defence it was proved that in October 1865 the defendant, through his agent, applied to the Commissioner of Crown Lands to purchase this lot, and his agent received a letter, dated Ottawa, 22nd November 1865, stating that the lot appeared vacant, and was for sale at \$1.25 per acre, cash. On the 6th of December 1865 the defendant deposited \$250, being the full purchase-money, at the agency of the Bank of Montreal at Chatham for the Commissioner of Crown Lands on account of the purchase, which payment was acknowledged by a receipt signed by the Assistant Commissioner, dated the 14th of December; and on the 6th of February following a grant under the great seal of the province was made of this lot to the defendant in fee. The defendant built a shanty intended to be on this lot, but when the boundary lines were run it proved to be on a lot adjoining. The defendant began to cut timber on the lot on the 29th of December, and was not interfered with until he had cut two-thirds of the quantity he made.

Plaintiff's men made the eleven pieces of timber after the defendant's men had begun to cut and draw. They began about the end of January, on the 29th of which month the defendant caused to be served on the plaintiff a notice that he (the defendant) was a purchaser of this lot from the crown, and had paid his purchase-money, and he "again" forbade him from hauling away any timber from the land. The plaintiff's men were cutting only four days on this lot. When the defendant built his shanty the plaintiff had no shanty in Romney.

The learned judge directed the jury to find whether the plaintiff or defendant was first in actual possession of the lot, and which of them first began cutting the timber on it. If the defendant was first in possession and commenced cutting before the plaintiff, and after the defendant had purchased and paid the price, he directed them to find for

the defendant. If the plaintiff was first in possession and cut the twelve pieces before the defendant purchased or took possession as a purchaser, or had notice of his right, then to find for the plaintiff for those twelve pieces. He ruled that the plaintiff had no right to the timber cut by the defendant, remarking on the object of the statute.

The jury found for the plaintiff for the twelve pieces damages \$4.

The plaintiff's counsel objected to the charge, contending that the plaintiff had a right to all the timber cut. The defendant's counsel contended that the jury should have been told that the defendant was entitled to a verdict, whether the plaintiff had or had not notice of defendant's purchase.

A. Prince, Q.C., obtained a rule calling on the plaintiff to show cause why there should not be a new trial for misdirection, in not ruling that the so-called licence gave the plaintiff no right to the timber growing on the land, and in not ruling that the sale to the defendant and the receipt of the Crown Land Commissioner of the purchase-money operated as a revocation of the licence, if it had otherwise any operation; and on the law and evidence.

Kingstone, on behalf of the plaintiff, obtained a cross rule for a new trial, the verdict being against law and evidence, in not extending to all the timber replevied; and on the ground of misdirection, in directing that if the defendant was found in possession of the lot, and commenced cutting timber after he had purchased and paid for it, and before the plaintiff began to cut, to find generally for defendant; and in directing that the plaintiff had no right to the sixty-eight pieces of timber.

Both rules were argued together.

Kingstone, for the plaintiff, cited *Doe dem Bowley v. Barnes*, 8 Q. B. 1037; *Wilson v. Mackreth*, 3 Burr. 1824.

Prince, Q.C., contra, cited *Deedes v. Wallace*, 8 C. P. 385; *Alexander v. Bird*, *Ib.* 539; *Henderson v. McLean* 16 U. C. R. 630.

The statutes cited are referred to in the judgment.

DRAPER, C.J., delivered the judgment of the court.

Two questions arise in this case: *First*, Has the plaintiff proved that he had a licence to cut timber on this lot, duly granted according to the Consol. Stat. C. ch. 23? *Second*, If the plaintiff had such licence, was it effectual and operative against the defendant?

First, The Consolidated Statute just mentioned in section 1 enacts that the Commissioner of Crown Lands, "or any officer or *agent under him authorized to that effect*," may grant licences to cut timber on the ungranted lands of the crown. The plaintiff produced a licence signed by Mr. Nash as agent for the commissioner. Mr. Nash proved his appointment and authority to act in that character. Its whole substance is in these words: "Mr. John R. Nash is hereby appointed to the office of Crown Timber Agent for the western division, U. C." No evidence was given of the powers or duties attached to that office. Whether there are any established regulations under which the agents so appointed may grant licences was not shown, nor was it proved that Mr. Nash was an agent "*authorized to that effect*;" and this language implies the necessity of some express authority, as the commissioner may have officers and agents who do not possess it. We see no proof that this authority accompanied or was added to the appointment of Mr. Nash as Crown Timber Agent. Without the authority there is no licence.

Second, If this difficulty were got over, the defendant's purchase would not revoke the timber licence, at least until the grant of the land was made. On another trial possibly the defect of the proof of licence might be supplied, and under the 16th and 17th sections of 23 Vict. ch. 2, it appears to me, as at present advised, that the plaintiff should succeed.

The 16th section provides for the issuing of a licence of occupation to a purchaser of crown lands, which authorizes the holder to take possession of and hold the land therein comprised, and to maintain suits against any wrong-doer or trespasser as effectually as under a patent from the crown, but *such licence of occupation has no force against a licence to cut timber existing at the time of the granting thereof*.

By section 17, among other things, every receipt for money received on the sale of public lands, so long as the sale to which such receipt relates is in force and not rescinded, shall have the same force and shall enure to the benefit of the party to whom the same was granted, in the same manner and to the same extent as a licence of occupation.

Now the dates which are important for the application of these sections are—1. The licence to cut timber, 22nd of November 1865. 2. Receipt for the purchase-money deposited with the bank agent at Chatham for the Commissioner of Crown Lands, 6th December 1865. 3. Receipt from the Commissioner of Crown Lands for the same, which we take to be the receipt mentioned in section 17, 14th December 1865. 4. Grant from the Crown, 6th February 1866, before which all the timber in question appears to have been cut. All therefore the defendant had when the plaintiff cut the eleven or twelve pieces of timber was the receipt, which had no force against the plaintiff's existing licence if that had been proved; and we do not at present see how the defendant can maintain the taking of these pieces of timber, if even the plaintiff's claim to the rest should fail.

We think, therefore, the defendant's rule should be made absolute and the plaintiff's discharged. Costs to be costs in the cause.

Rules accordingly.

M'CAMMON ET AL. v. BEAUPRÈ.

Married woman's deed—Certificate—Right of way—Description.

Where the certificate indorsed on a married woman's deed, executed in Minnesota, was given by a person described as the judge of the District Court in that State, and under the seal of the court, but it was not stated in the certificate (which would have been enough), or otherwise proved, that such court was a court of record—*Held*, insufficient.

A right of way ten feet wide, described as running north from a certain street, equally upon, along, and between two lots, to the depth of sixty feet, and then at right angles—*Held*, to extend only sixty feet between the lots, so that the crossway would lie within that distance, not ten feet beyond it, which would make the depth seventy feet.

DECLARATION for wrongfully obstructing a right of way from a messuage and premises, whereof the plaintiffs were possessed, being part of the south-easterly part of town lot number 49, and the whole of town lot number 18, on Brock Street, in the city of Kingston, known as the Bamford property, which messuage and premises are known as the front part of the subdivision lot number 1 of the said Bamford property, being twenty-two and a half feet front on Brock Street by sixty feet in depth, and such right of way being to and from the said messuage, etc., ten feet wide from Brock Street, equally upon, along, and between subdivision lots numbers 2 and 3 of the Bamford property to the depth of sixty feet, and thence across the said subdivision lot number 2 to the messuage, etc., of the plaintiffs.

Pleas—1. Not guilty. 2 Plaintiffs not entitled to the alleged way.

The case was tried at Kingston, in November 1865, before *Gwynne, Q.C.*, sitting for *Hagarty, J.*

The plaintiffs put in, first, an indenture dated the 7th of July 1858, made between Thomas Bamford of the first part; Richard Scobell, Samuel Muckleston, Remigius Beauprè, and Catherine his wife, formerly wife of Wm. H. Bamford, deceased, of the second part; Alexander Bamford, of the third part; Bruno Beauprè and Margaret Amelia, his wife, daughter of the said Thomas Bamford, deceased, of the fourth part; and Sarah Bamford, wife of the party of the first part, and Catherine C. Bamford, wife of the party of the third part, of the fifth part—reciting that certain of the foregoing parties, and the children of Wm. H. Bamford, deceased, of whom Scobell and Muckleston were

testamentary guardians, were-tenants in common in fee of the lands mentioned in the declaration, subject to a mortgage and to the payment of a life annuity, and that the parties had agreed to a partition, whereby the parties mutually conveyed in severalty to each party entitled one subdivision; the subdivision numbered one being conveyed to Margaret Amelia, the wife of Bruno Beauprè, and being the premises described in the declaration, with a right of way described thus: ten feet wide from Brock Street to the said subdivisions numbers one and four, as follows: that is, equally upon, along, and between subdivisions numbers two and three to the depth of sixty feet from Brock Street, then at right angles across these subdivisions to the subdivisions numbers one and four.

2nd. An indenture, dated the 3rd of January 1859, made between Bruno Beauprè and Margaret Amelia, his wife, of the first part, and Thomas M'Cammon of the second part, whereby the parties of the first part conveyed in fee to the party of the second part the land and premises described in the declaration, with the right of way as therein described.

This deed was executed in the United States, and indorsed thereon was a certificate from "Edward C. Palmer of St. Pauls, in the State of Minnesota, judge of the District Court of the second judicial district, in said State of Minnesota," of the due execution of the deed by Margaret Amelia Beauprè, and his examination of her, and of her free consent to depart with her estate in the lands mentioned in the deed. In testimony whereof he set his hand and affixed the seal of the said court. The seal bore round the edge the words, "Seal of District Court, Ramsey County," and within this the words, "Second District, Minnesota." It was objected that it was not shown that this district court was a court of record, and therefore that a due execution of the deed by the married woman was not proved. The objection was overruled.

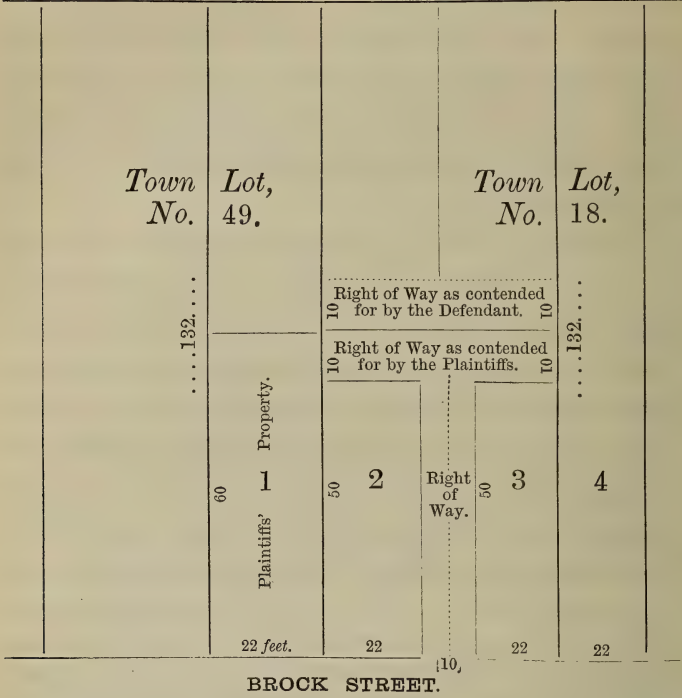
The residue of subdivision one was stated to have been conveyed by Bruno Beauprè and Margaret Amelia, his wife, to the defendant.

Upon these deeds the plaintiffs claimed a right of way ten feet wide, first between the subdivisions two and three, as to which for the distance of sixty feet there seemed no dispute. They then claimed a right of way ten feet wide crossing number two—the north side, that is, the side most distant from Brock Street, being sixty feet distant from that street. The defendant contended that the northern side of this crossway was ten feet beyond the sixty feet. If so, the plaintiffs failed.

The depth of each of the subdivisions was about 132 feet; and if each subdivision were held by one proprietor, it would seem a matter of indifference whether this crossway was in one place or the other. On the defendant's contention it would take ten feet more in depth from subdivisions two and three. But the plaintiffs owned only sixty feet from Brock Street, the defendant, as it was stated, owning the rest of that subdivision; and if the defendant's construction prevailed, the plaintiffs had no access to the rear of their premises except through the house, which occupied the whole front on Brock Street. The obstruction proved was the putting and keeping a pile of cordwood ten or twelve feet high across the ten feet of subdivision, two which were opposite the northern ten feet of the plaintiffs' premises. Until recently the plaintiffs had a gate less than fifty feet from Brock Street, and there was nothing to prevent access to it, a way being open across the other three subdivisions two, three, and four; but this was not the way granted, and as it seemed to have been interrupted, the plaintiffs asserted their present claim.

A plan was produced by a surveyor on behalf of the plaintiffs, showing the right of way as claimed by them. On the defence another plan was produced by a surveyor, showing the way in dispute north of sixty feet from Brock Street, which he represented to be in accordance with the deed of partition.

The following sketch will serve to show the position of the premises :—



The jury were directed, as a matter of law, that the right of way was as was claimed by the plaintiffs, and they found for the plaintiffs \$10.

In Michaelmas term *C. S. Patterson* obtained a rule to show cause why there should not be a new trial on the law and evidence, and for misdirection on the points raised at the trial.

In this term *M'Bride* showed cause, citing *Add. Torts*, 77, 78, 120-123.

DRAPER, C.J., delivered the judgment of the court.

The right of way is described in the deed of partition, and it is the true construction of this description that is in dispute. It is thus worded: "A right of way ten feet wide from Brock Street to the said subdivisions numbers one

and four, as follows: that is, equally upon, along, and between numbers two and three, *to the depth of sixty feet from Brock Street*, then at right angles across these subdivisions to the subdivisions numbers one and four."

I think it not impossible that this description does not express what was intended. The whole depth of the subdivisions from Brock Street appears to be 132 feet, and very probably the intention was to place the crossway at or near the centre of this depth, and that parties thought by giving first a right of way between and taken equally from subdivisions two and three for the distance of sixty feet, and then at right angles to the subdivisions one and four of the same width of ten feet, they would designate the crossroad as lying to the north of or beyond the sixty feet previously expressed. Such was my first impression during the argument. But I have, on further consideration, agreed with my brothers that there is nothing in the description which extends the right of way further north than sixty feet, and that the defendant's contention would carry the way "equally along and between" the subdivisions two and three for a distance of seventy feet, instead of sixty, as limited by the deed. We think, therefore, the deed was rightly construed at the trial.

We arrive with great reluctance at the conclusion that the proof of the deed of the 3rd of January 1859, by the female grantor, is not sufficient, and we think the plaintiffs must prove this deed to make out their title to the way, for the user, as we understand the evidence, is of a different way from that described in the deed. The Consol. Stat. U. C., ch. 85, authorizes married women to execute deeds of their real estate before (among others) "a judge of a Court of Record" in a foreign country. If this certificate stated that the district court was a court of record, it would be enough, but it states nothing from which it can be inferred, and the plaintiffs' counsel was driven to argue that because there was a seal to the judge's certificate that was evidence that the court was one of record. The same argument might be used to prove that our Division Courts are courts of record. We have no doubt that the fact can be proved

on another trial, and a very little forethought would have prevented the difficulty. But we feel constrained to hold that it must appear that the married woman has exercised the power given to her in the mode prescribed by law.

Rule absolute.

MULVEY *v.* THE GORE DISTRICT MUTUAL FIRE ASSURANCE COMPANY.

Insurance—Account of loss—Waiver—Misrepresentation—Right to recover back premium.

The condition of a Mutual Insurance Policy on goods required the insured, in case of loss, forthwith to give notice, and within thirty days after to deliver a particular account of such loss signed with his hand, and verified by his oath also if required, by his books of account and other proper vouchers. The account given consisted of his affidavit, stating that the premises were occupied by him as a general merchant's store; that the whole value of the goods and merchandise destroyed was \$800; and some accounts were attached of goods sold to him, showing however only charges of "goods per invoice."

Held, clearly no compliance with the condition.

The defendants' secretary wrote to the plaintiff after the fire that the defendants declined paying his claim in consequence of the facts not being stated in his application for the policy; and the plaintiff relied on this as a waiver of the account. *Held*, that such waiver should have been specially replied, and *Semble*, that if it had been, the letter was not evidence of it.

In his application the plaintiff untruly represented the building as furnished with a brick chimney. *Held*, that on this ground the policy never attached, and that the plaintiff therefore might recover back his premium.

THE declaration contained a count on a policy of insurance, dated the 23rd of July 1863, made by the defendants, whereby they covenanted to pay to the plaintiff all losses and damage, not exceeding in the whole \$400, which might happen to the goods and merchandise of the plaintiff contained in a frame building situate on the west side of the main road in the village of Ballsville, by fire, during the term of three years, setting out, among other things, a condition that upon the plaintiff sustaining any loss or damage by fire he should forthwith give notice thereof to the secretary, and within thirty days after deliver a particular account of such loss and damage, signed with his hand and verified by his oath or affirmation, also, if required, by his books of account and other proper vouchers. Averment of loss to

the value of \$400, and that the plaintiff gave the notices and particular account required by the policy, and kept and performed all other things stipulated in the policy, yet the defendants have not paid, etc.

There were also the common money counts.

Pleas.—1. *Non est factum*. 2. Denying that the plaintiff did within thirty days deliver in a particular account of his loss, signed and verified according to the condition in that behalf. 3. That the plaintiff by his application to defendants for the policy, and upon the faith of which the policy was issued, represented that the frame building containing the goods was furnished with a brick chimney, and the policy provided that the application should form a part of said policy; that such representation was of a fact material to be known to the defendants and material to the risk, whereby the defendants say that the plaintiff warranted that said frame building was furnished with a brick chimney; but in fact it was furnished with a stove-pipe in place thereof, by reason of which premises the defendants say they are not liable. 4. To the common counts, never indebted. Issue.

The trial took place in April last, before *Richards, C.J.*, at Brantford.

The policy was admitted, and the proofs of loss and damage which were furnished to the defendants were put in. The plaintiff's affidavit stated that on Tuesday evening, the 27th of September 1864, the premises in question, situate on the west side of the plank road, etc. (as in the policy), were totally destroyed by fire; that they were at the time occupied by him as a general merchant's store; that his goods and merchandise contained therein were insured in the Gore District Mutual Fire Insurance Company for the sum of \$400, and there was no other insurance thereon; that he was sole owner at the time of the fire; that being absent from home when the fire occurred, he could not say by what means the building took fire; that the whole value of the merchandise at the time of the fire was at least \$800, and he had sustained loss and damage to that amount.

Attached to this affidavit were several accounts from persons representing that the plaintiff had bought goods from

them, and some certificates that the plaintiff had been in the habit of making cash purchases from the signers. None of these accounts showed more than charges of "goods per invoice." There was also attached a cancelled note made by the plaintiff for \$48, and a receipt for \$20.

A receipt, dated the 8th of April 1863, signed by A. Goldie, who professed to be agent for the defendants, acknowledging payment to him of \$4.70, as part of the premium of the insurance, was proved, and it was also proved that Goldie was paid \$1.50 for survey and policy.

The plaintiff also produced two letters written by the defendants' secretary, the first dated 11th July 1863, informing the plaintiff, in reply to a letter from him, that Goldie was not an authorized agent of the company, and proceeding: "I am directed by the president to say that by your signing the enclosed premium note, and enclosing it to this office, the policy will be sent to you, and the note now in the hands of Mr. Goldie will be sent to you as soon as recovered from him. There will be no additional charge." The second letter, dated the 8th of October 1864, was as follows: "I am instructed by the Board of Directors to inform you that they decline paying your claim for loss, in consequence of the facts not being stated in your application, and in accordance with the first condition of the policy."

A witness swore that at the time of the fire there was over \$600 worth of goods destroyed—over \$800. A paper was shown this witness. He said he "would not like to swear" it was the plaintiff's signature, but it looked a little like it; that the document signed by the plaintiff when Goldie gave him the receipt was a blank proposal for a company in Hamilton; that Goldie was out of forms for the Gore District Mutual, and said he would take that one, it would do as well. The witness said that what the plaintiff signed was a double sheet of paper; that it was on the page on the right hand that he signed; that he did not read it over, but saw it was not a form in the Gore Mutual, and that he would swear the paper shown him was not it.

The defendants objected that the particulars of loss were

not a compliance with the condition, and that the letters of the defendants' secretary were no waiver, and that it was not competent for the directors to make such a waiver. Leave was reserved to defendants to move to enter a nonsuit.

The defendants' secretary was called as a witness. He stated that the application he produced was the same as when it was received by him; that when he examined the premises after the fire he found no remains of a chimney, and on inquiry found there had been no brick chimney on the premises; that at the plaintiff's house the witness showed him the application and asked him if that was his signature, plaintiff said it was; that the witness asked him how he came to misrepresent that there was a brick chimney in the house when there was none; plaintiff said he did not know that was entered in the application, it was not there when he signed it, or something to that effect. The witness told him the company would not have issued a policy unless there had been a good brick chimney, and the plaintiff admitted there was no chimney. The witness swore that the policy (which was countersigned by him as secretary) was issued on the faith of the representations that there was a chimney, and it would not have been issued without that statement. On cross-examination he stated that he thought the plaintiff's wife and father-in-law were present when the plaintiff made this statement; that the plaintiff also said he had signed another statement, and that he never knowingly stated there was a chimney in the house. The application was put in. One inquiry was, the number of chimneys, fireplaces, and stoves, and if having stone or brick gables through the roof? The answer was, "One brick chimney and one stove." Another inquiry was, "How many stove-pipes go through the wall or floor, and are they protected by stone or bricks?" The answer was, "One through floor—sheet-iron protection—perfectly safe, as the fire in stove is extinguished before closing the store."

In reply, the plaintiff called the owner of the building destroyed, who proved how the stove-pipe was secured, there being a brick chimney through the roof, and that he thought it secure; that he was at the fire, and when he first

got there the fire came out of the front windows, and none out of the top. Other witnesses confirmed this statement, both as to the security of the stove-pipe and that the fire showed itself through the building before the roof was on fire. The plaintiff's father-in-law swore he was present when Mr. Rich, the defendants' secretary, showed the plaintiff the application, and that the plaintiff said it was his name, but he never wrote it; that he signed his name on a double sheet of paper, and this was a single sheet.

The learned judge told the jury as far as respected the particular account of the loss to find for the plaintiff, the defendants having leave on this point to move for a nonsuit, or to reduce the verdict to \$6.20 without certificate for costs. On the other issue he left it to the jury to say if the plaintiff did sign the representation that there was a brick chimney in the house, and if such representation was of a fact material to be known to the defendants; that as there was a stove in which fire was to be used, and the pipe must go into some place, whether a chimney or not, it might be a very material thing for the defendants to know. He left it to them to say if the plaintiff made the representation, if not true, and if material.

The defendants' counsel objected that if the representation was made, and if it was untrue, it was of no consequence whether it was material or no.

The jury found for the plaintiff.

In Easter term *Moss* obtained a rule calling on the plaintiff to show cause why a nonsuit should not be entered pursuant to leave reserved, or for a new trial for the improper reception of evidence of waiver, there being no replication of waiver nor any pleading making such evidence admissible; or for a new trial for misdirection, in telling the jury it was necessary for the defendants to prove that the plaintiff's statement with regard to the chimney was material to the risk and material to be known by the defendants; or to reduce the verdict, pursuant to leave reserved, to \$6.20. He cited *Scott v. Niagara District Mutual Insurance Co.*, *ante*, p. 119; *Greaves v. Same*

Defendants, *Ib.* 127; *Sillem v. Thornton*, 3 E. & B. 868; *Anderson v. Thornton*, 8 Ex. 425; *Angell on Ins.* 195 *et seq.*; *CinquMars v. The Equitable Ins. Co.*, 15 U. C. R. 143; *Jacobs v. The Equitable Ins. Co.*, 17 U. C. R. 35; *Hatton v. The Beacon Ins. Co.*, 16 U. C. R. 316.

Martin showed cause, and cited *Mason v. Harvey*, 8 Ex. 821; *Dickson v. Equitable Assurance Co.*, 18 U. C. R. 246

DRAPER, C.J., delivered the judgment of the court.

We adhere to the general observations made in *Greaves v. The Niagara Insurance Company*. The courts neither can nor ought to set aside conditions upon which both parties have contracted, or treat a manifest neglect of them by the assured as a thing to be passed over, because the effect will be otherwise to deprive the assured of all remedy on the policy. The 13th condition of this policy most unequivocally calls for the delivery, within thirty days after the loss, of a particular account of the loss or damage. It appears to us it would be an absurdity to treat the affidavit of the plaintiff as a compliance with the condition. It states, after mentioning the fact of the destruction of the building on the evening of Tuesday, the 27th of September 1864, that the premises were at the time of the fire occupied by the plaintiff as a general merchant's store; that his goods and merchandise contained therein were insured with the defendants for the sum of \$400; and that he has sustained loss and damage to the amount of \$800. The vouchers attached to this affidavit give little or no information as to the nature and description of the goods, nor is it even in evidence that these vouchers relate to the goods which were damaged or destroyed. This "particular account" is even more general than the policy itself, which states the insurance to be on the plaintiff's goods, wares, and merchandise, being "a general stock of dry goods, groceries, and all articles usually kept and sold in country stores."

The argument for the plaintiff on this point has been, that in a small country store, with such a general stock, it is almost impossible to give full particulars; but in this case,

if it is to prevail, it amounts to an assertion that it is unnecessary to give any. An account of every article, or of the precise quantity of any named articles, could not be reasonably expected, and if demanded, to rely on its not being given would cast a shade of *mala fides* on the defence; but such is not the present case. The defendants are without any information beyond that contained in the words goods and merchandise. The argument of difficulty is pushed to an extravagant length when such an account is rested upon it as a sufficient account, and this court would in effect annul the condition if they held such an account was a compliance with it. We agree the condition is not to be too strictly construed; but the plaintiff was bound to afford to the defendants some statement or information from which they could reasonably satisfy themselves that he had sustained loss or damage entitling him to the indemnity he claimed. (See *Mason v. Harvey*, 8 Ex. 819.)

But it has been further insisted that the defendants have waived a performance of this condition, or that they accepted the account as sufficient. The foundation for this contention is the letter of the defendants' secretary of the 8th of October 1864. In the first place, as is said by *Robinson, C.J.*, in *Hatton v. The Beacon Insurance Company* (16 U. C. R. 317), the plaintiff "did not set forth in a replication that the condition was waived. He was in no situation to rely on the alleged waiver if it could have helped him." In the next we are not satisfied that this letter ought to be treated as evidence that the defendants were satisfied with the account or waived any condition of the policy. They wholly refused to acknowledge the plaintiff's claim, whether the reason they gave was sufficient or no.

We think, however, the plaintiff is entitled to recover back his premium. We are in his favour so far, but mainly because we are strongly impressed against him on the question as to the brick chimney. On this ground we think the policy never attached, and therefore we would make this rule absolute to reduce the verdict as asked. The plaintiff, however, if he prefers it, may take a nonsuit.

BANTING v. THE NIAGARA DISTRICT MUTUAL FIRE
ASSURANCE COMPANY.

Insurance—Account of loss.

The plaintiff suing upon a policy of insurance, which required a particular account of the loss, as in the last case, had given only a statement that the property insured, consisting of general merchandise in his store, was totally consumed, as were also his books of account, invoices, and papers relating to the business, and that the value, as nearly as could be ascertained without such books, etc., was \$3000. His affidavit was attached verifying this statement. The evidence at the trial, however, showed that he had the means of furnishing a more particular account through those from whom he had purchased.

Held, no compliance with the condition.

The reasonable construction of this condition is, that the assured shall produce to the company something which will enable them to form a judgment whether the loss or damage claimed for was actually sustained; and so construed it is wholly unobjectionable.

DECLARATION on a policy against loss by fire, made on the 1st of November 1864, for three years from date, for \$2500 on stock of goods, etc., in a frame building, situate on lot No. 3, on the north side of Queen Street, in the village of Cookstown.

Pleas.—1. Goods not destroyed by fire. 2. Non-delivery within thirty days after loss of a particular account thereof, verified by the plaintiff's books of account and other vouchers, according to a condition of the policy. 3. That the fire was caused by the plaintiff or by his procurement, and that of others in collusion with him, with intent fraudulently and feloniously to destroy the goods. 4. The policy was procured from the defendants by the fraud of the plaintiff. 5. Misrepresentation by the plaintiff in his application of the value of the goods, as being worth \$4000, when the value was much less, contrary to the conditions.

Issue on the first four pleas, and a denial of the allegations in the fifth.

The case was tried in April last, at Barrie, before *Adam Wilson, J.*

The fire seemed to have been discovered about one or two in the morning of the 18th of January, and the store and everything it contained was destroyed.

Upon the second issue the plaintiff put in evidence the following statement: "The property insured, consisting of general merchandise in the store occupied by the under-

signed in the village of Cookstown, in the county of Simcoe, with the said store itself, was totally consumed and destroyed by fire, as were also all the books of account, invoices, and papers relating to the business of the said Charles Banting, on the morning of the day above mentioned; and the value of the stock on hand, and which was insured with the said insurance company, was, as nearly as can be ascertained (without the assistance of the said books of account and the invoices, etc.), \$3000." Signed by the plaintiff.

To this was attached an affidavit sworn by the plaintiff, stating that he carried on the business of a general store-keeper since 1864; that the stock on hand on the 18th of January 1865 was on that day totally consumed by fire; that his books of account and all his papers were at the same time destroyed by the fire, and in consequence he was unable to state positively and with more particularity than as above the amount and value of the goods destroyed; that he had arrived at the conclusion that the value of his said stock of merchandise so destroyed was about the sum of \$3000, by deducting from the gross amount of the purchases which he made at the time and since he commenced business the supposed amount of sales, and he believed the statement was correct as to the amount of the value of goods destroyed, as well as in other respects.

It was objected that this account was no evidence of a compliance with the condition, and leave was reserved to move for a nonsuit on the objection.

There was some evidence to go to the jury on the other issues. The verdict was for the plaintiff, \$1800.

James Miller obtained a rule calling on the plaintiff to show cause why a nonsuit should not be entered pursuant to leave reserved, or for a new trial, the verdict being contrary to law, evidence, and the judge's charge. He cited *Greaves v. The Niagara District Mutual Fire Ins. Co.*, *ante*, p. 127; *Scott v. The same Defendants*, *ante*, p. 119.

McCarthy showed cause, citing *Catlin v. The Springfield Fire Ins. Co.*, 1 Sumner, 435, 440; *Mason v. Harvev.* 8

Ex. 821; *CinquMars v. Equitable Ins. Co.*, 15 U. C. R. 143, 246; *Mann v. Western Ass. Co.*, 19 U. C. R. 314, 332; Angell on Insurance, sec. 239.

DRAPER, C.J., delivered the judgment of the court.

We cannot distinguish this case in principle from Greaves against these same defendants, decided in this court in last Michaelmas term (25 U. C. R. 127), nor from *Mulvey v. The Gore District Mutual Assurance Company*, in which judgment was given last Monday.* There is a difference in the precise facts, but they rest precisely on the same ground, namely, the non-observance on the part of the plaintiff of a condition precedent to his right to recover.

Of the conditions which we find indorsed by different Assurance Companies upon their fire policies, there is perhaps no one less open to just objection than the one in question, which requires (within thirty days after the loss) the persons assured to deliver in a particular account of the loss or damage, signed by their own hand, and verified by their oath or affirmation, and by their books of account or other proper vouchers. The information called for is material, a moderate time is given for the insured to prepare it, and the character of the information is clearly expressed, viz. a particular account verified, etc. It would be alike unjust and absurd to hold that a particular account meant an account of every particular of the loss, but it is surely not less so to contend that the two words "general merchandise" amount to a particular account; and yet those are the only two words used by the plaintiff descriptive of the stock-in-trade for the loss of which he is claiming compensation under his policy. The condition must receive a reasonable construction on both sides, and its meaning, as we construe it, is that the assured will, within a fixed time after the loss, produce to the company something which will enable them to form a judgment whether the loss claimed for or the amount as claimed for damages was actually sustained; and so construed, it is a condition which no prudent

* *Ante*, p. 424.

or honest man could object to, and one which we have no disposition to fritter away.

A distinction was suggested on the argument between loss or damage, the application of which to the present case we do not perceive, as the plaintiff's stock-in-trade is alleged to be totally consumed, and if so, was certainly lost, though a case might happen in which the claim would arise exclusively upon goods injured and more or less diminished in value, but not destroyed.

It was also made apparent at the trial that the plaintiff had the means of obtaining, and therefore of furnishing, independently of personal knowledge, a more particular account. The evidence showed that on the 23rd of October 1864 (the fire was in the January following) he purchased the great bulk of the goods from his uncle, who had up to that time carried on business in the same shop. The goods were sold, a great portion of them on the shelves, and the uncle stated the value of the whole to be \$3800 at invoice prices, though he sold for \$3600; that about \$1800 worth of these goods were recent purchases, some of which had not yet arrived; some were scarcely opened, and which he had ordered in Montreal in the previous September from a firm which he named; and that he had handed the invoices to the plaintiff. Besides this the plaintiff had since then purchased groceries and other things in Toronto from a firm which had furnished similar goods to the uncle, who had sold them, or part of them, to the plaintiff. The uncle also swore that \$1400 or \$1500 of the goods newly ordered by him were "heavy tweeds, factories, and prints," so that there were means of affording a more particular account of the character of the goods, as well as of verifying it, by obtaining duplicates of the invoices, to the extent of apparently one-half of the stock on hand or purchased.

On the whole, we are of opinion the rule to enter a non-suit should be made absolute.

Rule absolute.

NEWMAN v. NIAGARA DISTRICT MUTUAL FIRE ASSURANCE
COMPANY.

Compulsory reference at N. P.—Making order a rule of court—Certificate by arbitrator.

Action upon a policy of insurance on goods. *Pleas.*—Denying the policy—setting up that the goods were not destroyed—that the plaintiff gave no notice of the loss as required—misrepresentation as to value of the goods and mode of heating the premises—increase of risk by alteration. After the examination of one witness the judge at *Nisi Prius* ordered a compulsory reference. The award, dated 30th April, was in favour of the plaintiff. The evidence and proceedings, with the exhibits, were annexed, with a certificate signed by the arbitrator, dated 11th May, stating that he certified the same to enable the defendants to move against his award if so advised.

A rule *nisi* was granted in the Practice Court to set aside the verdict and award, and for a new trial or reference back, and was moved absolute in full court, though not on the face of it returnable there. The main objection was that the arbitrator had found due notice and account of the loss given, whereas it was disproved by the plaintiff's own evidence.

Held, 1. That before moving the order of reference should have been made a rule of court.

2. That the objection being to the arbitrator's finding on the evidence, was untenable unless misconduct could be inferred.

3. *Seemle*, that the compulsory reference was authorized; but *Held*, that the defendants, having attended at the arbitration without protest, were precluded from raising this objection.

4. *Seemle*, also, that the certificate could not be looked at, as it was written after the award.

Remarks as to the practice of arguing rules in full court moved in Practice Court.

THE first count in the declaration was on a policy of insurance, dated 30th November 1863, whereby the defendants agreed to insure the plaintiff in the sum of \$2000 on his stock of dry goods, groceries, hardware, crockery, wines, liquors, ready-made clothing, boots and shoes, contained in a rough-cast frame building in the village of Elora, until the 30th of November 1866, subject to conditions indorsed on the policy. Averment that the said goods, etc., were destroyed by fire, whereby the plaintiff suffered loss to the amount of \$4000, yet the defendants have not paid. Common money counts were added.

Pleas.—1. *Non est factum*. 2. The said goods were not destroyed by fire. 3. Setting out a condition, that the plaintiff on suffering loss by fire should forthwith give notice, and within thirty days deliver a particular account, etc.; that the plaintiff did not forthwith give notice, and within thirty days after his loss deliver in a particular account of such loss or damage, signed by his own hand,

and verified by his oath or affirmation, and by his books of account or other proper vouchers. 4. That the policy was obtained by the fraud and misrepresentation of the plaintiff, in representing that his general stock of dry goods, etc., were worth \$6000, whereas in truth they were worth only \$4000, and in making and causing to be made statements to the defendants as to the number of stoves kept upon the premises and the partitions through which they passed, and how they were protected, and that the plaintiff would not deviate therefrom without first giving notice to the defendants' secretary and obtaining the defendants' consent. Averment that the plaintiff did wilfully deviate, and did make false statements, and concealed the fact that the building was heated by a hot-air apparatus, and concealed the risk arising therefrom, whereby the policy became void. 5. That after the making of the policy the plaintiff materially altered the premises mentioned in the application, and in which the goods, etc., were kept, so as to vary and increase the risk, by erecting thereon a stove and apparatus for heating the premises with hot air. These five pleas were pleaded to the first count.

6. To the common counts, never indebted. Issue.

The trial took place at Guelph, in March 1866, before *Richards, C.J.* After the plaintiff had examined one witness, the learned Chief Justice referred the whole case to the judge of the County Court of the County of Wellington, under the 160th section of the C. L. P. Act, Consol. Stat. U. C., ch. 22.

James Miller obtained a rule in the Practice Court, calling on the plaintiff to show cause why the verdict and the award should not be set aside and a new trial granted, or why the cause should not be referred back to the arbitrator, if the court should be of opinion that it is a cause which can be referred by compulsory reference on the following grounds: 1. That the arbitrator, as appears by his certificate and the award, held "that the notice of loss by fire had been given by plaintiff to the defendants, and had within thirty days after said loss delivered in a particular account of such loss or damage, signed by the plaintiff's own hand, and verified

by his oath or affirmation, and by his books of account and other proper vouchers—whereas it was established by the plaintiff's own evidence that he had not done so, as required by the condition of the policy.”

This rule was drawn up on reading the award made herein, the affidavit attached thereto, and the certificate of the arbitrator, and was moved absolute in the full court, though not on the face of it returnable therein.

The affidavit stated that this cause was at the last Guelph assizes referred to the award of the Judge of the County Court of the County of Wellington against the will of the counsel for the plaintiff and defendants; that the annexed papers, marked A 1 and A 2, were the award and certificate of the said judge herein.

The award annexed to this affidavit bore date the 30th of April 1866. Its execution was no otherwise proved than by this affidavit. It recited that by an order made at the sittings of *Nisi Prius* held at Guelph on the 22nd of March, before the Chief Justice of the Common Pleas, it was ordered that the jury should find a verdict for the plaintiff for \$1961.10 damages, subject to a reference to the said arbitrator, the award to be binding, with power to increase or reduce the verdict, or order a verdict for the defendants, with power to enlarge the time for making the award, costs of the cause and of the arbitration to abide the event, the award to be made on or before the first day of the then next term, the arbitrator to have the same power as a judge at *Nisi Prius*. The award contained a finding upon all the issues, and ordered that the verdict entered for the plaintiff should stand on the issues on the first count for the sum of \$1697, and that a verdict be entered for the defendants on the issue on the second count.

Annexed to this award was a statement of the evidence and proceedings had before the arbitrator, with the exhibits produced; and it concluded, “I certify the same and my conclusions thereupon, to enable the defendants to move against my award if so advised.”

S. Richards, Q.C., showed cause. He objected to the sufficiency of the materials on which the rule appeared to

have been granted, and to the reception of the certificate, as being a document made or signed by the arbitrator after the award was made; citing *Leggo v. Young*, 16 C. B. 626; *Russell on Awards*, 470, 471, 298, 626; *Holgate v. Killick*, 7 H. & N. 418; *The London Dock Co. and the Trustees of Shadwell*, 32 L. J. Q. B. 30. He also argued on the questions raised by the rule.

James Miller, contra, cited *Kent v. Elstob*, 3 East, 18; *Jones v. Corry*, 5 Bing. N. C. 187; *Hodgkinson v. Fernie*, 3 C. B. N. S. 189; *In re Hall and Hinds*, 2 M. & G. 847; *Caswell v. Groucutt*, 31 L. J. Ex. 361; *McDonald v. McDonald*, 7 U. C. L. J. 297; *Russell on Awards*, 295, 669.

DRAPER, C.J., delivered the judgment of the court.

The first question that arises is, Are we properly in possession of this case? It is not shown that the order of *Nisi Prius* has been made a rule of court. The 163rd sec. Consol. Stat. U. C. ch. 22, enacts that the proceedings upon *any such arbitration* shall, except otherwise directed by this Act or by the submission or document authorizing the reference, be conducted in like manner and be subject to the same rules and enactments as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, or otherwise, as upon a reference made by consent under a rule of one of the superior courts of common law or the order of a judge thereof. The preceding sections, beginning with section 158, show that a compulsory reference is included in the words "any such arbitration." It is true that the order of *Nisi Prius* which is indorsed on the record before us contains no power to make the reference a rule of court; but *Millington v. Claridge* (3 C. B. 609) decides that, this being a proceeding in a cause, there can be no doubt as to the power of the court to make the order a rule of court. In *Russell on Awards*, 559, 2nd ed., numerous authorities are cited in support of the position, that before proceeding to enforce the award by summary process the submission must be made a rule of court. It appears to us to make no difference whether the object be to enforce or to impeach

the award, and the common practice undoubtedly is to make the submission or order of *Nisi Prius* a rule of court before moving to enforce or set aside the award.

The terms of this rule appear also designed to raise a question as to the power to make the compulsory reference. We are clearly of opinion that that question is not open for discussion on this rule. And here we may observe that this rule granted in the Practice Court is not on the face of it made returnable here, though it was argued without objection on that ground. We notice this because, although it is in the discretion of the judge presiding in the Practice Court so to direct, it would, we think, be a most inconvenient practice to allow parties to argue here rules obtained in that court upon some understanding between themselves; and further because, although in substance the rule is directed against the award, yet in terms it asks to set aside the verdict and for a new trial.

The rule, limited by the grounds on which it was asked for and granted, seeks to overturn the award because the finding of the arbitrator is contrary to the evidence as shown in the certificate annexed to the award. Such, reduced to its lowest terms, is the true character of the objection; and assuming the authority to refer, at which the rule does not strike, the objection is untenable unless misconduct is to be inferred. We do not think the defendants could be heard to question the reference after appearing before the arbitrator and taking part in the entire proceedings. Two cases—*Ringland v. Lowndes*, 10 Jur. N. S. 850, and *Davies v. Price*, 34 L. J. Q. B. 8, and 11 L. T. N. S. 203—show that a party may appear under protest before an arbitrator, and afterwards raise the objection of the want of legal authority, but we hear nothing of any protest in this case; the defendants seem to have been content, though the reference was made against their will, to take their chance of a decision in their favour.

In this latter view, at all events, we think the rule should be discharged, for the application is in truth an attempted appeal against the arbitrator's decision of a matter of fact.

The case of *Angell v. Felgate* (7 H. & N. 396), and the

authorities therein cited, may be referred to with advantage on the question of this being a case in which a judge could order a compulsory reference. My impression is strong against the objection hinted at, but not really raised for decision by the rule.

I am also strongly impressed in favour of the plaintiff's case by the consideration that the award appears to have been made on the 30th of April 1866, while the statement or certificate annexed thereto bears date the 11th of May following. *Holgate v. Killick* is a clear authority, among several others, to the same effect, that the court will not look at a letter or document written after the completion of the award. Apart from objections of a character more affecting the form than the substance, though such as if found to exist in fact must have prevailed in law, we think the plaintiff has established a meritorious case to recover. We think the rule must be discharged.

Rule discharged.

MONTREAL ASSURANCE COMPANY *v.* M'CORMICK.

Money paid under mistake—Right to recover.

The mortgagees of a vessel had insured her with the plaintiffs. She was stranded at a place not within the policy, and the plaintiffs, who had received a protest from the captain assuming that they were liable, sent their agent to get her off. The agent met defendant at the place, and, in his own words, "employed him as he would have employed a perfect stranger" to perform the service, advancing to him \$300 on account. The defendant, it appeared, was in fact an owner of or interested in the vessel, but when acquired or to what extent was not shown. The plaintiffs having discovered that they were not liable, demanded back the money, which defendant refused to pay, alleging that he had used it, and they then sued.

Held, that the jury were warranted in finding for defendant; for if the money was not paid upon the policy, but advanced upon a distinct agreement, the mistake as to their liability would not enable them to recover.

DECLARATION for money lent, work and materials, money paid for defendant, money received by defendant for plaintiffs' use, and on account stated.

Pleas.—1. Never indebted. 2. Payment. 3. Set-off.

The case was tried at London in November 1865, before *Richards, C.J.*

The plaintiffs had granted a policy of insurance, dated 20th November 1863, to F. W. Thomas, agent for the

Bank of Montreal at Goderich, insuring \$2000 on his interest in the hull, tackle, and engine of the steamer "Valley City," to be employed in navigating the river St. Clair only, for a year from 31st October 1863 at noon. On the 23rd of November 1863 the plaintiffs' agent at Goderich wrote to Van Allan and Williams at Chatham, through whom the policy had been effected, as follows: "Last year the rate on the 'Valley City' was ten per cent., but reduced to nine per cent. on condition that the vessel was to lie up in November. This entitled the vessel to navigate the lakes. I understand the vessel is only employed for trade between Detroit and Chatham, and the Company have agreed to nine per cent. Policy will follow accordingly."

It came out during the trial that the defendant had become interested in this vessel as owner, and that she had been mortgaged to the Bank of Montreal, whether before or after defendant acquired his interest not appearing.

On the 6th of September 1864 the "Valley City" was cast ashore at Kingsville, which is on Lake Erie. The captain knowing she was insured, but not knowing in what company, sent a protest to Van Allan to be served on the proper party; and the plaintiffs' agent wrote a letter, dated the 10th of September 1864, to Van Allan and Williams as follows: "By referring to my letter of the 23rd of November 1863, you will observe that the risk on the 'Valley City' was restricted to the route between Detroit and Chatham. The policy in the hands of Mr. Thomas expressly states so. We are consequently not liable for any disaster on Lake Erie. On first receiving your telegram I was not aware of the position of Kingsville; but on reading the protest and referring to the map the agent as well as myself are satisfied that the policy does not cover any disaster on Lake Erie. I have forwarded the protest to the head office."

On the 11th of September Captain Taylor, an agent of the plaintiffs, came to Kingsville, where the vessel lay, and he contracted with the defendant to get her off for \$665, and went to Windsor with defendant, and there advanced him \$300 for that purpose. The defendant procured chains,

etc., and went again to Kingsville. Soon after Captain Taylor received a telegram informing him that the disaster to the "Valley City" was not within the policy, and he went again to Kingsville, and demanded the \$300 back from defendant, who said he had used most of the money. It was sworn by the captain of the "Valley City" that the defendant had then procured timber, anchors, and chains, etc., and had spent more than \$300 since he agreed to get the vessel off in prosecuting that work. The defendant at that time insisted the policy protected the steamer at Kingsville. Captain Taylor stated most clearly that it was in the full belief that she was covered by the policy that he made the bargain with defendant and advanced the money to get her off, but he also stated that he employed defendant just as he would have employed a perfect stranger to get the vessel off; that if it had cost \$1000 to do this he would only have paid \$665, as he agreed; that he had nothing to do with the policy; his instructions from the plaintiffs were to get the vessel off, and he obeyed them.

It was objected for the defendant that the evidence did not show that the money was paid to the defendant as any satisfaction to him for the loss or injury to the vessel owing to her being on shore; it was beyond doubt paid on a contract made with him to get her off; that the policy was not made to him; that therefore an action for money had and received would not lie, and there was no other count on which the plaintiffs could recover.

The learned Chief Justice reserved leave to defendant to move to enter a nonsuit on this objection, and subject to this he directed that if the \$300 were paid by plaintiffs' agent to defendant under the impression that the vessel was covered by the policy granted by the plaintiffs for risks upon Lake Erie; and if that was erroneous, and the plaintiffs' agent demanded that sum back, to find for the plaintiffs for that amount, but if paid on any other account, then to find for the defendant.

The jury gave a verdict for the defendant.

In Michaelmas term *Becher, Q.C.*, obtained a rule to

show cause why there should not be a new trial, the verdict being contrary to law and evidence. He cited *Holland v. Russell*, 4 L. T. Rep. N. S. 547; *Townsend v. Crowdy*, 2 L. T. Rep. N. S. 537; *Kelly v. Solari*, 9 M. & W. 54.

M. C. Cameron, Q.C., showed cause, and cited *Platt v. Bromage*, 34 L. J. Ex. 63; *Barber v. Pott*, 4 H. & N. 759.

DRAPER, C.J., delivered the judgment of the court.

We are of opinion this rule should be discharged.

The plaintiffs had by a time policy insured the steamer "Valley City" for a year against loss or damage while navigating the river St. Clair, or, according to their agent's letter, while employed in running between Chatham and Detroit. During the year she was stranded at a place on Lake Erie clearly not within the limits stated in the policy. This insurance had been effected by an agent of the Bank of Montreal for their protection, as they held a mortgage upon the vessel. The captain of the steamer on the accident occurring forwarded a protest to a former owner of the vessel to serve on the insurers, as he did not know who they were, and they, assuming they were liable, immediately despatched an agent to get her off. He met the defendant apparently where the vessel was, and, in his own words, "employed him as he would have employed a perfect stranger" to do this service. At this time the defendant was an owner or had an interest in the steamer, but it was not shown when acquired nor to what extent. The plaintiffs' agent agreed with him to get her off for \$665, and advanced him \$300 on account. The defendant set to work, and expended this money and more upon it. Then the plaintiffs, having discovered their mistake, sent back their agent, and he demanded the money back, but the defendant said he had mostly used it, and would not pay it; and this action was brought to recover it.

We think the finding of the jury is fully warranted by the evidence, and, coupled with the charge of the learned Chief Justice, the verdict establishes that the money was not paid on the policy, but on a distinct agreement for a good consideration. No doubt the plaintiffs would not have autho-

rized nor would their agent have entered into this agreement but for the mistaken idea of the effect of their policy, but that mistake cannot enable them to rescind the agreement partly performed by the defendant, and on which the money was advanced. The plaintiffs had no claim on the policy, nor was the agent instructed to make a payment, but to remedy the disaster on the terms he thought best, and there was no mistake of fact in his paying the person who contracted and began the work.

Rule discharged.

CONNELL *v.* BOULTON.

Covenant against encumbrances—Measure of Damages.

In an action on a covenant that the defendant had done no act to encumber, contained in a conveyance of land by the defendant to the plaintiff for a consideration of £150,

Held, that the plaintiff was entitled to recover the whole amount due upon an outstanding mortgage, although it exceeded the purchase money and interest, and the mortgage included other lands sufficient in value to satisfy it.

DECLARATION on a covenant contained in an indenture dated the 24th of September 1860, whereby the defendant conveyed to the plaintiff, in consideration of £150, certain lands in the town of Cobourg, and covenanted with the plaintiff that he had not done any act or thing whereby the said lands were or might be impeached, charged, affected, or encumbered in title, estate, or otherwise. *Breach*, that before making the indenture, *i.e.* on the 30th of December 1843, defendant had conveyed the said lands, with other lands, to one Corrigan in fee, by way of mortgage, to secure £600, which mortgage was at the time of the commencement of this suit in force and unsatisfied.

Plea.—Payment of one shilling into court in satisfaction.
Replication.—Sum insufficient.

The trial took place in October 1865 at Cobourg, before *Draper, C.J.*

It was admitted that the plaintiff entered into possession of the land mentioned in the declaration under the indenture of bargain and sale therein also mentioned, and had con-

tinued in possession ever since, and had made improvements thereon to the extent of £400; that the consideration money in the deed was £150, and the interest from the date of the deed was £46, 10s., making principal and interest \$786; that the defendant executed the outstanding mortgage in the declaration mentioned at the time alleged therein, and that the same was outstanding in full force, and unsatisfied; that the amount due and unpaid upon the mortgage was £450; that the mortgage covered other land besides that of the plaintiff, which other land was of the full value of the mortgage money and interest.

It was agreed that a verdict be entered for the plaintiff for \$786; and leave to the plaintiff to move to increase the verdict to such sum as the court should think proper, and to the defendant to move to reduce the verdict to such sum as the court should think proper, or to enter a verdict for the defendant.

In Michaelmas term *Nanton* obtained a rule to reduce the verdict to one shilling, or to such sum as the court should think fit, or to enter a verdict for the defendant on the plea of payment into court.

In the same term *J. D. Armour* obtained a cross rule to increase the verdict to £450.

In this term both rules were argued.

J. D. Armour, for the plaintiff, cited *Lethbridge v. Mytton*, 2 B. Ad. 772; *Gibson v. Boulton*, 3 C. P. 407; *Carlisle v. Orde*, 7 C. P. 456; *Raymond v. Cooper*, 8 C. P. 388; *Kennedy v. Solomon*, 14 U. C. R. 623; *M'Donell v. Thompson*, 16 U. C. R. 154; *Stuart v. Mathieson*, 23 U. C. R. 135; *Randall v. Raper*, 1 E. B. & E. 84; *Vane v. Lord Barnard*, *Gilb. Eq. Rep.* 7; *Mayne on Damages*, 101; *Dart. V. & P.* 507, 3rd ed.; *Sug. V. & P.* 610, 14th ed.

J. H. Cameron, Q.C., for the defendants, cited *Kennedy v. Solomon*, 14 U. C. R. 623; *Graham v. Baker*, 10 C. P. 426; *Sikes v. Wild*, 4 B. & S. 421; *Mayne on Damages*, 89.

DRAPER, C.J.—It appears to me that *Lethbridge v. Mytton* (2 B. & Ad. 772) governs this case. Sir William

Follett, in argument for the defendant in that case, put the question in the most favourable light for his client. But Lord Tenterden remarked, "If the plaintiffs are only to recover a shilling damages, the covenant becomes of no value at law." In this case there are other lands on which the defendant's mortgage is a charge, but the plaintiff's land is nevertheless charged with the whole sum due on the mortgage. I think the plaintiff's rule to increase the verdict must be made absolute. This will most probably drive the defendant into equity, but in a court of law I do not see my way to another conclusion.

In my opinion the rule to increase the verdict to £450 should be made absolute, the other rule discharged.

HAGARTY, J.—There is a dearth of authority in our books as to the damages on covenants for title.

Mr. Mayne gives it as his opinion that there is no difference in principle between a covenant against encumbrances and a covenant to pay off encumbrances, and that if so the law is settled by *Lethbridge v. Mytton*.

If the point were unaffected by authority, it would not be easy to understand why the plaintiff here, who has bought a property with a covenant that his vendor had done no act to encumber, should not recover such damages for a breach of that covenant as would put him in the same position as if his vendor had truly performed his part of the contract. We have no power to apportion the mortgage money over the various properties affected; the only complete relief we can give is to award the full amount to pay off the encumbrance. The parties would then have to adjust their equities elsewhere.

Lethbridge v. Mytton would, we may assume, have been decided in the same way if the encumbrance which the defendant covenanted to pay off had extended over other properties than those included in the settlement.

It is of course to be noticed that the mortgage money here considerably exceeds the purchase money and interest. It has been usually held that in the absence of fraud the latter amount was the measure of damages for breach of covenant

of seizin or right to convey. The well-known case of *M'Kinnon v. Burrowes* (3 O. S. 593) discusses the point at large. An analogy is there sought to be established with the sale of chattels. It is put somewhat as the case of a consideration wholly failing, and the purchaser recovers back his purchase money and interest.

In *Mayne*, p. 95 *et seq.*, the question is discussed: "The conveyance may, notwithstanding the defect of title, pass something to the covenantee, or it may in fact pass nothing at all." He cites a Massachusetts case, in which it was said, "No land passing by the defendant's deed to the plaintiff, he has lost no land by the breach of the covenant; he has lost only the consideration paid for it. This he is entitled to recover back, with interest to this time."

The other case is also put, and an old case of *Gray v. Briscoe* (Noy, 142) is cited: "B. covenants that he was seized of Blackacre in fee-simple, when in truth it was copyhold land in fee, according to the custom. By the court. The covenant is broken. And the jury shall give damages in their consciences, according to that rate, that the country values fee-simple land more than copyhold land."

In the case before us the plaintiff at all events acquired the equity of redemption in the estate, with right to pay off the encumbrance. The evidence shows that he has largely improved the property, trebling its value since he acquired it. He contracted for an estate free from encumbrance, and defendant contracted that he had not encumbered. Had he covenanted to pay off the existing mortgage he would, on the authorities, be liable in damages for the whole amount thereof. I am unable to recognise any substantial distinction between the cases. American authority seems opposed to the English doctrine. Mr. Sedgwick, in his work on Damages, questions the correctness of *Lethbridge v. Mytton*.

It is said that on a reference as to title in equity an outstanding mortgage is treated not as a matter of title, but as of conveyancing. I presume that on a contract of sale in terms similar to those of the covenant before us the vendor would be forced to relieve the property of the encumbrance

by payment or otherwise. After conveyance executed a court of equity would probably compel the specific performance of a covenant to pay off an encumbrance by an appointed time. Where, as here, it is merely a covenant that the vendor has done no act to encumber, the only remedy is by action for damages, and I cannot see why such remedy should not be complete, and not merely illusory, as it would be if defendant's argument prevailed. As *Parke, J.*, says in *Lethbridge v. Mytton*: "At law the trustees were entitled to have the estate unencumbered at the end of a year from the marriage. How could that be enforced unless they could recover the whole amount of the encumbrances in an action on the covenant?"

MORRISON, J., concurred.

Rule absolute to increase verdict.

BAKER v. BAKER.

Dower—Devise—Election.

Dower.—Plea, on equitable grounds, that the husband by will devised the land to defendant, in trust to maintain and support the demandant during her life in provisions, firewood, and everything necessary for her comfort, and allow her the use of two rooms in the house, and all the furniture, and provide her with a horse, two cows, and a servant girl; or if she preferred it, should give her £50 a year, payable quarterly; that such allowance and maintenance was intended by testator to be in lieu of dower; and the demandant, since his death hitherto, in lieu of her dower hath elected to occupy the rooms, etc., and defendant hath provided her with all things required by the will, which she elected to take, and did take, in lieu of her dower.

Held, plea bad, as not showing a case in which equity would put the widow to her election.

DOWER.—The demandant claimed as the widow of Jonathan Baker, deceased, her dower in lot 11, in the second concession of Vaughan.

Plea, on equitable grounds, that the said J. B. in his lifetime duly made and published his last will and testament in writing, in due form of law as required for the passing of real estate, and thereby did give, devise, and bequeath unto the defendant the said lot number eleven, with the dwellings, messuages, and appurtenances thereon, in trust and upon

condition that he, the above-named defendant, would during the natural life of his wife, the said demandant, maintain and support her in provisions, firewood, and everything necessary for her comfort, and more especially that the defendant would give and allow to her the exclusive use of two rooms in the house upon the said lot in which he, the testator, resided, and all the furniture in said house, and that he, the defendant, should provide her with one horse and two cows, and also, if she required it, provide her with a servant girl to attend her during her life; or if the said demandant should prefer it, said defendant should give her the sum of £50 per annum during her life, payable quarterly, in lieu of said maintenance. And the testator, Jonathan Baker, departed this life seised in fee of the said lot without having in any way revoked his said will. And the defendant says that the said allowance and maintenance, in and by the said will directed to be given, allowed and furnished to the said demandant by the defendant as such trustee as aforesaid, was by the testator intended to be, and in fact was to be, in lieu of the dower of the said demandant in or out of the said lot, with the dwellings, messuages, and appurtenances thereon or thereto belonging. And the demandant ever since the death of the said testator hitherto, in lieu of her dower in or out of the said lot with the appurtenances thereto belonging, hath elected to occupy the said rooms in the said will mentioned, with all the furniture in the said house, and to receive from defendant everything necessary for her comfort and support; and the defendant hath, in compliance with the terms and conditions of the said will and the trust in him thereby reposed, entered upon the said lot, and out of the issues and profits thereof furnished the demandant with provisions and firewood, and everything necessary for her comfort, and more especially hath provided her with one horse and two cows, and a servant girl, at all times since the death of the said testator, and did in all things comply with and furnish to the said demandant all things by the said will required to be furnished by him, the defendant, to the demandant, which provision, maintenance, support, and occupation of the said rooms, with said

furniture, she, the demandant, elected to have, occupy, receive, and take, and did have, occupy, receive, and take, as and for and in lieu of her dower of, in, to, and out of the said lot; wherefore defendant prays judgment if demandant ought to have her dower in and out of the said lot, with the messuages, dwellings, and appurtenances thereon.

Demurrer, on the grounds—1. That it is not alleged in the said plea that the devise in the will of the said Jonathan Baker to the demandant was by the will asserted to be in lieu of the demandant's right to dower. 2. That there are no facts stated in said plea on which a court of equity would put the demandant to elect between taking under the devise in the said will of the said Jonathan Baker, or claiming dower out of the lands mentioned in the said devise.

Anderson, for the demurrer, cited Tudor Lea. Cas. R. P. 64; *Parker v. Sowerby*, 1 Drew. 488, 4 De G. M. & G. 321; *Warbuton v. Warbuton*, 2 Sm. & G. 163; *Gibson v. Gibson*, *Ib.* 43; *Nottley v. Palmer*, 2 Drew, 93; *Pepper v. Dixon*, 17 Sim. 201.

Bell, Q.C., contra, cited *Hall v. Hill*, 1 Dr. & W. 94.

HAGARTY, J., delivered the judgment of the court.

In *Hall v. Hill*, in 1841 (1 Dr. & W. 94), *Lord St. Leonards* says, p. 102: "It is hopeless for any judge to expect to reconcile all the cases upon the subject; it would be impossible to do so. In this case the widow took not only an annuity charged upon the entire estate, but also a portion of the very estate. Out of that part, of course, the widow is not dowable; but the question still remains, whether the testator had disposed of the estate on such terms as indicates an intention that his widow was not to take anything *dehors* the will. . . . It is now clearly settled that the mere gift of an annuity out of the estate has not the effect of barring the widow of dower. . . . If it had been an untouched question, I should have decided, like *Lord Camden*, that an annuity and dower were inconsistent, and that one should be deemed a satisfaction for the other. The law is, however, decided the other way, and so I must now take it."

He subsequently decides against the widow on a leasing power to trustees over all the estates. *Knight Bruce, V.C.*, follows this decision in *Grayson v. Deakin* (3 De G. & Sm. 298).

In 1852 *Kindersley, V.C.*, decided *Gibson v. Gibson* (1 Drew. 51) and *Parker v. Sowerby* (*Ib.* 488). In the first he says: "It is not enough to say that upon the whole will it is fairly to be inferred that the testator did not intend that his widow should have dower; in order to justify the court in putting her to her election, it must be satisfied that there is a positive intention to exclude her from dower, either expressed or clearly implied." He notices how *Lord Thurlow* had answered the argument as to the testator's devising *all* his estate, "Because the testator gives all *his* property to the trustees, am I to gather from his having given all he *has* that he has given that which he *had not*?" "This," said the Vice-Chancellor, "appears to me wholly to demolish the argument derived from the circumstance of the testator having described his lands as 'all *my* lands,' as if including what he could not dispose of, viz. his widow's dower." In *Parker v. Sowerby* he repeats the rule, "You must find an intention so to dispose of his estate that her claim to dower would be inconsistent with that disposition. . . . A long series of cases has decided that though a devise to trustees on trust for sale is not inconsistent with the widow's right to dower; yet a devise on trust to manage or to lease does indicate an intention so to dispose of the estate that the widow's enjoyment of dower is inconsistent with it. . . . If a testator has devised any part of his real estate, so that the claim of dower is inconsistent with carrying into effect the testator's whole intention, she is put to her election."

This case was confirmed on appeal in 1854 (4 De G. M. & G. 325). The Lord Chancellor (*Cranworth*) says, "It is not, I think, quite correct to state the general rule of law as being that, to raise a case of election against the wife, the will must show that the testator had in his mind her right to dower, and that he meant to exclude it. The rule rather is that it must appear from the will that the testa-

tor intended to dispose of his property in a manner inconsistent with the wife's right to dower." He fully recognises the effect of the leasing power. Some doubts expressed by *Stuart, V.C.*, in *Warbuton v. Warbuton*, decided in the same year (2 Sm. & G. 166), are noticed by one of the Lords Justices, apparently without approval.

Unless the law laid down up to 1854 has been dissented from, it seems to us that we are bound to decide against this plea.

In *Bending v. Bending* (29 L. T. Rep. 224, 3 K. & J. 257, 3 Jur. N. S. 635), *Wood, V.C.*, in 1857 reviews the authorities, and says, "*Stuart, V.C.*, in *Warbuton v. Warbuton*, remarking upon *Hall v. Hill*, seems to consider the amplitude of the provision made for the widow as a material ingredient, and that where she had by the will more than her dower it was not intended that she should have her dower too. That, I think, would be opening a door to a greater inconvenience than hitherto the court has had to struggle with. Here, I think, the testator intended his wife to have much more than her dower."

This was a strong case. The testator had directed a sale of all his estates, and bequeathed half the proceeds to his wife absolutely. He similarly disposed of his personalty. The widow was held entitled to her dower and full benefit under the will.

The devise here may be thus stated : To the defendant in fee, on condition of supporting the widow for life in provisions, firewood, and everything necessary for her comfort, she to have the exclusive use of two rooms in the house, all the furniture, a horse and two cows, and a servant girl to be provided for her; or, if the widow preferred it, the defendant should pay her £50 per annum for life, quarterly, in lieu of maintenance.

Lord St. Leonards points out that neither an annuity out of the estate nor the gift of a portion of the estate will put her to elect. This disposes of the two most important arguments in the defendant's favour.

It may be, though it does not appear on these pleadings, that the provision made for her is most ample in relation to

the value of the estate. *Wood, V.C.*, seems to decline accepting that as an argument for compelling election.

If this were to be decided as a case of first impression, we might safely take *Lord St. Leonards'* individual view in *Hall v. Hill*. As it is, we think the law is too clearly settled for doubt.

Judgment for demandant on demurrer.

IN RE SCOTT AND THE CORPORATION OF THE COUNTY OF PETERBOROUGH.

Survey—C. S. U. C. ch. 93, secs. 6-9—C. S. C. ch. 77, secs. 58-61.

The county council passed a by-law directing a township municipality to levy and collect from *the patented and leased lands* of the township a certain sum required to reimburse the expenses incurred in a re-survey of the township. *Held*, that the by-law was illegal, for the statute directs that such expense shall be defrayed by the "*proprietors*" of the lands interested.

Semble, that the jurisdiction to pass such a by-law should appear on the face of it by showing a survey such as a statute contemplates.

Quære, whether the Act authorizes the re-survey of a whole township.

R. A. Harrison obtained a rule during last Hilary term calling on the defendants to show cause why so much of a by-law, No. 262, of the corporation of the County of Peterborough, which enacts that the municipality of Smith and Harvey be required to levy and collect from the patented and leased lands of the township of Harvey such a rate as will produce \$2541.5, to reimburse the expenses of the re-survey of the township of Harvey, should not be quashed with costs, for illegality, on several grounds: among others—1. That the jurisdiction or power of the corporation to levy or direct the levy of the \$2541.5 is not shown on the face of the by-law, in this, that it is not shown that such a survey as the statute contemplated had been previously made as the statute directs; and that the survey was not in fact one such as the statute contemplated. 2. That a direction to levy the same from the patented and leased lands of the township of Harvey, and not from the resident landholders, as mentioned in sec. 6, ch. 93, Consol. Stat. U. C., and sec. 68, ch. 77, Consol. Stat. C., or the pro-

prietors, as mentioned in sec. 9 of the first-mentioned statute, and sec. 61 of the last-mentioned statute, is bad.

During this term *C. S. Patterson* showed cause, citing *Hodgson v. The Municipal Council of York and Peel*, 13 U. C. R. 268; *Tylee v. The Municipal Council of Waterloo*, 9 U. C. R. 572.

Robert A. Harrison, in support of the rule, cited *Cooper v. Wellbanks*, 14 C. P. 364; *Grierson v. The Municipality of Ontario*, 9 U. C. R. 630; *Tanner v. Bissell*, 21 U. C. R. 553.

From the affidavits filed in support of the application and the copies of extracts of the minutes of the council of the County of Peterborough referred to, it appeared that on the 25th of March 1863 a committee of the council recommended that the townships of Burleigh and Harvey be re-surveyed in all places where the old lines could not be found, and that stone monuments be placed on the governing lines, and that a memorial be sent to the government to appoint John Reid and Theodore Clementi to make such re-survey; that on the 27th of March 1863 the county council memorialized the government, representing that the settlement of the townships of Harvey and Burleigh had been greatly prevented owing to the uncertainty which existed regarding the lot and concession lines, the landmarks of the old surveys having in a great measure been obliterated. And they prayed His Excellency the Governor-General to cause a re-survey of those townships to be made, stating that towards the expenses of the survey they were prepared to contribute in the proportion of the lands patented in those townships; and they recommended for such survey the appointment of Messrs. Reid and Clementi, provincial surveyors.

It also appeared that the government, through the Honourable the Commissioner of Crown Lands, caused the township of Harvey to be wholly re-surveyed by the surveyors, or one of them, above-named, the amount of remuneration being first settled at five cents an acre, being the lowest government price, and which was agreed to by the

county council on the 15th of May 1863; and on the 22nd of January 1864 a resolution was adopted by the council, authorizing the warden to enter into an agreement with Mr. Clementi for the re-survey of the township of Harvey, and to pay him at the rate of five cents per acre for the whole area of land and water—all lakes and waters to be properly laid out on the plan, with their contents in acres; and it further appeared that, upon the certificate and order of the Commissioner of Crown Lands, the treasurer of the county paid \$2541·5 as their proportion of the expenses incurred in performing such re-survey.

An affidavit of the treasurer was filed on showing cause, who swore that in order that the sum of \$2541·5 might be levied by the corporation of the united townships of Smith and Harvey, as well as to inform them of the amount necessary to be raised and levied to defray and pay the expenses of the re-survey, that part of the by-law sought to be quashed was passed; and that the corporation of the united townships did thereupon pass a by-law for the purpose of levying the said sum of money, and that they proceeded to act under such by-law, and that before this application they levied and collected a large portion of the money, but had not yet paid the same to the county of Peterborough.

MORRISON, J., delivered the judgment of the court.

As our judgment proceeds upon the ground of the second objection taken, it is unnecessary to decide whether the first objection is sustainable, although it is probable, upon an examination of the 6th, 7th, 8th, and 9th sections of ch. 93, Consol. Stats. U. C., and corresponding sections 58, 59, 60, and sec. 61 of ch. 77, Consol. Stats. C., which are word for word the same, that the by-law, upon the ground of the first objection, would be found to be illegal.

As to the second objection, assuming the county council had authority to pass the by-law as to a re-survey of the whole township, it was contended that that part of the by-law requiring the amount to be levied and collected from the patented and leased lands of the township of Harvey is

illegal and defective, and we are of opinion that the objection is well taken.

The term *leased lands* is very ambiguous. No doubt the council intended it to apply to lands leased by the Crown. The sixth section referred to enacts that the survey shall be at the cost of the proprietors of the lands interested, and the ninth section refers to the same being levied on the said proprietors. The term *proprietor* we take to apply to and include a larger class of persons than owners of patented and leased lands. The by-law should have followed the words of the statute. Thus restricting the levying of the expenses to a smaller class of persons or lands than those mentioned in the statute, may exempt many persons and lands from paying or being liable to a share of the expenses, and thereby cast a heavier burden upon the other inhabitants and owners, contrary to the provisions of the statutes.

Upon this ground, in our judgment, that portion of the by-law moved against is defective and illegal and ought to be quashed.

During the argument it appeared to me that the portion of the by-law objected to only amounted to a mere expression of opinion of the county council, and that it was unnecessary that this court should interfere ; but, on consideration, permitting the by-law to remain as it is, might hereafter give rise to some difficulty, or in some way effect or create a liability on the part of the municipality of Harvey ; and the better course, in order to avoid future question, is to set it aside.

Rule absolute to quash so much of the by-law objected to with costs.

Rule absolute.

MOLSON v. BRADBURN.

Contract—Waiver—Pleading.

Declaration, that the defendant agreed to sell and deliver to the plaintiff within one week certain wheat, and the plaintiff advanced \$600 on account, yet the defendant failed to deliver. *Plea*, that before breach it was agreed that the plaintiff should waive the delivery within one week, and the plaintiff did then waive the same, and extended the time for delivery.

Held, plea bad, for no subsequent delivery was alleged, nor that the extended time had not elapsed.

DECLARATION.—For that on the 19th of September 1865 it was agreed by and between the plaintiff and the defendant that the defendant should sell and deliver to the plaintiff within one week, and that the plaintiff should buy and accept from the defendant, at one dollar and twenty-five cents per bushel, the wheat grown and raised during the season then just terminated on a certain farm of the defendant's, that is to say, about one thousand bushels; such wheat to be white wheat, equal to and in every respect similar to a sample then recently exhibited by said defendant to one Cluxton, an agent of the plaintiff; and said plaintiff did on the said nineteenth day of September pay to, and the said defendant received on account and as an advance on the price of said wheat, the sum of \$600. And all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to have such wheat delivered equal in all and every respect to such sample as aforesaid, yet the defendant failed to deliver to the plaintiff such wheat equal to the sample aforesaid, and therein made default, whereby the said plaintiff lost the said sum of \$600 so paid to the defendant as aforesaid as an advance on such wheat as aforesaid, and the profits which he would have derived from the performance of the said agreement by the defendant.

Plea.—That after the alleged contract, and before any breach thereof, it was agreed by and between the plaintiff and the defendant that the plaintiff should waive and dispense with the delivery of said wheat within one week from the time of said contract, and the plaintiff then waived and discharged the defendant from delivering the said wheat

within the time aforesaid, and extended the time for the delivery thereof.

There was a replication to this plea which it is unnecessary to set out here, and to which the defendant demurred. The plaintiff joined in demurrer, and gave notice of the following exceptions to the plea: 1. That the said plea is no answer to the said first count, but, on the contrary, confesses the contract there set out and the breach thereof alleged, without showing any avoidance of the said cause of action, said first count not charging as a breach that said wheat was not delivered within one week, but that "all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to have such wheat delivered," etc., "yet the defendant failed to deliver such wheat," etc., which said breach so alleged charges the defendant with default in delivery of wheat within the week, and within such further time as may have been granted to the defendant as alleged.

2. That the said plea does not show that the contract set out in said first count was rescinded, waived, or abandoned, or that a new contract was substituted, but, on the contrary, that such original contract was, notwithstanding the alleged waiver and extension of time, a valid and subsisting contract; and further, that such alleged waiver or extension of time amounted simply to a collateral or independent contract or agreement, that the plaintiff, after the expiration of the said period of one week, would accept and receive such wheat on said contract, but does not show that such wheat was delivered by the defendant to the plaintiff, and accepted by him as performance of the defendant's part of said contract within the extension of time so given, or even that such wheat was during such extended time tendered by the defendant to plaintiff.

Robert A. Harrison, for the defendant, cited *B. & L. Prec.* 458; *Steele v. Harmer*, 14 *M. & W.* 831; *Foster v. Dawber*, 6 *Ex.* 839.

J. A. Boyd, contra, cited *Cummings v. Arnold*, 3 *Metc.* 486, 491; *Case v. Barber*, Sir *T. Raym.* 450; *Edwards v.*

Chapman, 1 M. & W. 231; *Lavery v. Turley*, 6 H. & N. 239.

HAGARTY, J., delivered the judgment of the court.

We do not think the plea open to the objection that the waiver or new agreement should be stated to have been in writing.

It is a statement of a variation of a parol agreement by mutual arrangement before breach; and, at all events where the declaration does not state a contract in writing, we see no authority for requiring a plea of this character to show that the variation or rescission was in writing.

As to the evidence required to support the plea at trial, we need not discuss that question on this demurrer. The late case of *Noble v. Ward* (L. R. 1 Ex. 117) declares the law on that head. As to the point of pleading, we may refer to *Bullen & Leake* Prec. 368, 369, and cases there cited; *Whittaker v. Mason* (2 Bing. N. C. 359); *Goss v. Lord Nugent* (5 B. & Ad. 65).

But the plea seems to be no answer on other grounds. The declaration seems to claim not merely damages for failing to deliver within a week, but generally for non-delivery before action brought, and seeks to recover the whole money advanced as on a total failure of consideration. If so, how could an issue joined on this plea dispose of the case? Extending the time originally fixed, without any averment that a subsequent delivery took place, or that the extended time had not elapsed when action commenced, does not seem to form a complete answer, but leaves everything still open and incomplete.

The plaintiff by this course of pleading is driven either to demur or expose himself to the objection here taken to his replication, that it is a departure.*

* The replication was, that after the contract, and before breach, the plaintiff at the defendant's request consented and agreed to accept the said wheat equal and in every respect similar to the said sample within a reasonable time after the expiration of the said period of one week, on account of and in performance of said contract, which is the waiver and extension of time pleaded, yet the defendant did not deliver within a reasonable time thereafter, although the plaintiff during such time was ready to accept said wheat and pay the balance of purchase-money.

We are strongly of opinion that the plea is no answer, and that the plaintiff should have judgment. It is unnecessary in this view to discuss the replication.

Judgment for plaintiff on demurrer.

M'HENRY AND WIFE *v.* CRYSDALE.

Promissory note—Mistake in amount—Equitable plea.

Declaration by administratrix of A., on a promissory note for \$140, made by defendant payable to A. or bearer. *Plea*, that at the time of making the note defendant owed A. \$150, and said note was by mistake made for \$140; that to correct the error defendant immediately made a second note for \$150 at A.'s request, who received it in full satisfaction of defendant's indebtedness and of the note sued on, which was inadvertently left by defendant with A., and after his death came into the plaintiff's hands; that the plaintiff also became possessed of the note for \$150, which she transferred to one F., who brought an action on it against defendant in the Division Court, which is still pending.

Held, on demurrer (reversing the judgment of the County Court), a good plea, notwithstanding that the \$150 note was not averred to be negotiable.

APPEAL from the County Court of the County of Hastings.

Declaration, by John M'Henry, as plaintiff for conformity, and Ann M'Henry, his wife, who sues as administratrix, limited, of all and singular the goods and chattels, rights and credits, which were of George Addison, deceased, who died intestate. First count: For that in the lifetime of George Addison, on the 15th of January 1861, the defendant, by his promissory note now overdue, promised to pay to the said George Addison, or bearer, \$140, three months after date, for value received, but did not pay the same to said George Addison, or since his death to said John M'Henry, or Ann M'Henry, as administratrix as aforesaid. The second count was on a note for \$100, and the third on a note for \$54·56, both made by defendant payable to said George Addison or bearer.

Plea, upon equitable grounds, that at the time of the making of the promissory note in the first count of the declaration mentioned, the defendant was indebted to the said George Addison in the sum of \$150, and that said note of \$140, mentioned in said first count, was

made by the defendant through mistake as to the amount for which it should have been drawn, viz. for \$150; that in order to correct the mistake, at the request of said G. A., the defendant made immediately thereafter a second promissory note for the true amount, to wit, \$150, which the defendant then owed said G. A., who took and received the same in full satisfaction and discharge of the defendant's said indebtedness, and of the said note in the first count mentioned, and which latter note the defendant forgot to then take up and destroy, but inadvertently left with the said G. A., and for which there never was any value or consideration given save and except as aforesaid. And the defendant further alleges that the said note in the first count mentioned was thus left in the hands of the said G. A. inadvertently and by mistake, who afterwards died intestate, and the same came into the hands of the plaintiffs without value or consideration. And the defendant further avers that the plaintiffs have since the death of the said G. A., and before the commencement of this suit, become possessed of the said note of \$150, so given in lieu of the note in the first count mentioned, which said note of \$150 the plaintiffs before the commencement of this suit sold and transferred to one Julius G. Farmer, who before the commencement of this suit brought an action in the First Division Court of the County of Hastings against the defendant, to recover a balance alleged to be due upon said last-mentioned note, to wit, the amount of \$90, which said suit is now pending in the said last-mentioned court. And the defendant avers that before action he paid to said G. A. in his lifetime, and to the plaintiffs since, sufficient to satisfy the causes of action in the second and third counts mentioned, and also sufficient to pay all claims and causes of action which the said G. A. in his lifetime had, or the above plaintiffs had at the commencement of this suit or now have against the defendant in this suit.

To this plea the plaintiff demurred, on the ground, amongst others, that the note pleaded as having been given in lieu of the other was not shown to be negotiable.

On this ground the learned judge in the court below gave

judgment against the plea, referring to *James v. Williams*, 13 M. & W. 827; *Leonard v. Atcheson*, 7 U. C. R. 32.

The defendant appealed.

Diamond for the appeal, cited *Blain v. Oliphant*, 9 U. C. R. 473; *Clark v. Ring*, 13 U. C. R. 185; *Evans v. Powis*, 1 Ex. 601; *Goss v. Lord Nugent*, 5 B. & Ad. 65; *Flockton v. Hall*, 14 Q. B. 380; *Macfarlane v. Ryan*, 24 U. C. R. 474.

Robert A. Harrison, contra, cited *Drain v. Harvey*, 25 L. J. C. P. 81; *Balfour v. Official Manager of the Sea Assurance Co.*, 27 L. J. C. P. 17; *James v. Williams*, 13 M. & W. 827; *Leonard v. Atcheson*, 7 U. C. R. 32; *Moore v. Gurney*, 22 U. C. R. 209; *Falek v. Gooch*, 4 F. & F 591, note *a*.

MORRISON, J., delivered the judgment of the court.

The objection taken, that the note which was given for the correct amount of the intestate's debt, and in lieu of the other, was not shown or averred to be negotiable, and which objection was sustained by the learned judge, is not in our opinion applicable to this plea; for it appears to us quite immaterial whether the \$150 note was negotiable or only payable to the intestate, for whether it could only be sued in the plaintiff's name or otherwise could not affect the equitable defence here set up against the \$140 note.

The latter note being admitted on the pleadings to have been drawn up and designed for the same debt for which the \$150 note was given, but being made by mistake for a less amount than the debt due by the defendant, and which mistake at the request of the intestate was by the defendant rectified by his making a new note for the correct amount, nothing could be more inequitable than to attempt to enforce payment of the \$140, and that after having sold and transferred the \$150 note; and in our judgment a perpetual injunction would be granted by a court of equity to prevent so gross an act of injustice.

We cannot help remarking that in the demurrer there are assigned no less than thirteen causes of demurrer, some of them over three folios in length. Such a proceeding is

quite unnecessary, and one cannot but think the object in so doing is merely to increase the attorney's costs.

Judgment of the court below must be reversed, and judgment given for the defendant on the demurrer to the equitable plea.

Appeal allowed.

DARLING ET AL. v. BUELL THOMAS HITCHCOCK AND JOHN
GOLDSMITH HITCHCOCK.

Declaration on three promissory notes, made by defendant, payable to the order of H. at the Bank of B. N. A. in Montreal, and indorsed by H. to plaintiff. *Plea*, that the notes were made payable in Montreal at the request of the plaintiffs, who resided and had their domicile there, to the order of H., who indorsed the same to plaintiffs, who received the same for the accommodation of defendant; that by Consol. Stat. L. C. ch. 64, all notes payable in L. C. shall be taken to be absolutely paid and discharged if not sued upon within five years after maturity, and that five years had elapsed. *Replications*—1. That each note was dated at Cornwall in U. C., and was in fact made by defendant and indorsed by H. there, where they resided, and that this action was commenced within six years. 2. After the same statement of making and indorsing at Cornwall—that neither defendant nor H. ever resided or had any property in L. C.; that when the causes of action accrued defendants had gone to, and had ever since resided in, the United States, and plaintiffs were unable to discover their residence or serve them with process till the commencement of this suit; and that according to the law of L. C. plaintiffs could not have sued defendant there at any time since the cause of action accrued.

Held, following *Hervey v. Jacques*, 20 U. C. R. 366, that by the statute referred to the lapse of five years without suit extinguished the debt, and not merely barred the remedy; and that the defendant therefore must succeed.

The courts are bound to take judicial notice of every public Act of the Provincial Legislature though its operation may be locally limited.

DECLARATION upon three promissory notes made by defendants, payable to the order of H., at the office of the Bank of British North America in Montreal, and indorsed by H. to the plaintiffs. The first was dated the 6th August 1859 for \$243.40, three months after date. The second was dated 19th September 1859 for \$236.38, one month after date. The third was dated 19th September 1859 for \$248.56, three months after date. Common counts were added.

Pleas by defendant J. G. H. to 1st, 2nd, and 3rd counts: That the three notes were made payable at the office of the

Bank of British North America in Montreal, in part of the Province of Canada called Lower Canada, at the request of the plaintiffs, who then and ever since carried on business and had their domicile in Montreal, in that part, etc., to the order of the said H., who indorsed and delivered the same to the plaintiffs, who received the same for the accommodation of defendants. *Averment*, that under ch. 64, Consol. Stat. L. C., all bills of exchange, whether foreign or inland, and all promissory notes due and payable in Lower Canada made after the 1st August 1849, shall be held and taken to be absolutely paid and discharged if no suit or action has been brought thereon within five years next after the day on which such bills or notes shall become due and payable. *Averment*, that five years elapsed after the notes became payable and before the commencement of this suit.

To the common counts this defendant pleaded never indebted, and that the causes of action did not accrue within six years.

The plaintiffs took issue on these pleas, and for a second replication to the first plea (by leave of a judge) said that each of the three notes is on the face of it dated at the town of Cornwall, in Upper Canada, and were in fact made by defendants and indorsed by said H. at Cornwall aforesaid, where defendant and said indorser resided, and that neither defendant nor the indorser resided in Lower Canada, and that this action was commenced before the expiration of six years after the maturity of any of the notes.

And for a third replication—after repeating the statement that the notes were made and indorsed in Cornwall, where the maker and indorser had their domicile—that neither the maker nor the indorser ever resided in Lower Canada or had any property therein, and that when the cause of action on the notes accrued the defendants had departed from the Province of Canada, and had gone to and have ever since resided in the United States of America, and that the plaintiffs were unable to discover the place of residence of and effect service of process on defendants till the commencement of this action, and that according to the laws of Lower Canada the plaintiffs could not have impleaded the

defendant for any of the causes of action at any time since the accruing thereof in the courts of Lower Canada.

The defendant J. G. H. demurred to the second replication, on the grounds—1. That there is no exception in the statute mentioned in the said plea, but that the same is positive and applicable to a maker of a note resident in Upper Canada as well as one resident in Lower Canada. 2. That the said statute is at all events applicable to the promissory notes in question in this cause, and extinguishes the remedy upon the same.

And to the third replication, on the grounds that the absence of the defendant from Canada and the inability of the plaintiffs to discover his residence make no difference in the effect of the said statute, there being no provision contained therein to that effect.

The defendant B. T. H. suffered judgment by default.

The plaintiffs went to trial at the last assizes for York and Peel before *Draper, C.J.*, when they got a verdict, against which, on the motion of *C. S. Patterson*, in this term, a rule was granted calling on the plaintiffs to show cause why there should not be a new trial, the verdict being contrary to law and evidence, the substance of the plea being admitted, and the allegation that the notes were made payable in Montreal for the convenience and at the request of the plaintiffs being wholly immaterial and not of the substance of the plea, and therefore not in issue.

The rule and the demurrer were argued together.

Robert A. Harrison, for the plaintiffs, cited, in addition to the cases referred to in the judgment, *Ridout v. Manning*, 7 U. C. R. 35.

C. S. Patterson, Kerr with him, for defendants, cited *Shearm v. Barnard*, 10 A. and E. 593; Add. Con. 1004.

DRAPER, C.J.—In *Hervey et al. v. Jacques* (20 U. C. R. 366) this court pronounced a unanimous decision that by force of the statute 12 Vict. ch. 22, after the lapse of five years without an action being brought upon a promissory

note due and made payable in Lower Canada, such note is to be held and taken to be absolutely paid and discharged.

In *Hervey v. Pridham* (11 C. P. 329) an opposite conclusion was arrived at as to the effect of the same statute by a majority of the then judges of that court.

More recently, in the case of *Sheriff v. Holcombe* (13 C. P. 590), the Court of Common Pleas have unanimously adopted the same conclusion as this court did in *Hervey v. Jacques*.

This last decision was appealed against, and the appeal was dismissed (2 Appeal Reports, 516), the court in effect saying that the lapse of five years operated as an extinguishment of the debt without suit, not as a bar of the remedy only, though the judgment of the court below was, as pointed out by my brother *Hagarty*, sustainable on grounds not conflicting with *Hervey v. Pridham*.

I shall not affect a conviction I do not feel as to the proper construction of the statute referred to. Looking, however, at the decisions of the courts, which are no longer opposed, I think it a safer course to hold myself while sitting here bound to act upon the law as pronounced in this court in *Hervey v. Jacques*, leaving to the plaintiffs to carry the question before a higher tribunal if they are so advised. And I therefore am prepared to give judgment in favour of the defendant on the demurrer, and to make the rule for a new trial absolute.

We have no difficulty in holding that we are bound to take judicial notice of every public Act of the legislature of Canada, although its operation may be locally limited.

HAGARTY, J., and MORRISON, J., concurred.

Rule absolute.

Judgment for defendant on demurrer.

HOWLAND ET AL. v. ROWE.

Absconding debtor.

An attachment against an absconding debtor issued by the order of a judge in Chambers may be set aside by another judge.

M^rMichael, in Michaelmas term last, obtained a rule, calling upon the defendant to show cause why the order made by *Mr. Justice Hagarty* in Chambers, setting aside the writ of attachment granted in this cause against the defendant as an absconding debtor, should not be set aside and rescinded, on the ground that the learned judge had no jurisdiction to make such order, and that no proper grounds for setting aside the said writ appeared in the papers on which the summons or order were granted.

By the order in question, made in Chambers on the 10th of November 1865, the order on which the writ of attachment was issued, the writ of attachment, the seizure of defendant's property and effects thereunder, and all proceedings thereon or had thereunder, were rescinded and set aside for irregularity.

Robert A. Harrison showed cause during this term, citing *Demill v. Easterbrook*, 10 U. C. L. J. 246; Consol. Stat. U. C. ch. 25.

M^rMichael supported the rule.

DRAPER, C.J., delivered the judgment of the court.

It is argued that the statute gives the authority to either of the superior courts, or any judge thereof, or the judge of any County Court, to order a writ of attachment to issue (Consol. Stat. U. C. ch. 25, sec. 2), and that the authority so exercised cannot be reviewed or interfered with by any other judge, if at all. This seems the whole question.

The practice has prevailed almost from the time we have had an Absconding Debtor Law, and we think it better to adhere to it.

Rule discharged with costs.

GRANTHAM *v.* SEVERS ET AL.*Trespass—Several defendants—Measure of damage.*

In joint trespasses each defendant is liable for the damage occasioned to the plaintiff by the joint act, and the court will not interfere because as regards one the verdict may be excessive.

TRESPASS *qu. dom. fregit*, and assaulted and beat plaintiff, and seized and carried away plaintiff's goods, etc. etc.

Plea, not guilty, by statute.

The defendant Severs was the bailiff to whom the warrant of distress was given, and he sent the other two defendants to execute it. They committed a trespass by distraining on the plaintiff's goods in another house than that on which the rent was due. She resisted them, and they laid hands on her, and seized and brought away the goods.

The jury found for the plaintiff \$450.

Blevins, on behalf of defendant Severs, applied for a rule for a new trial, the damages being excessive as regarded Severs, who was only a constructive trespasser.

Cur. Adv. Vult.

DRAPER, C.J., delivered the judgment of the court.

We think there should be no rule. In joint trespasses the question is not which trespasser of several has acted best or worst, which is most, which least guilty, but what is the damage occasioned by the joint trespass to the plaintiff. Each defendant is liable with his fellow-trespassers for that sum. *Clark v. Newsam* (1 Ex. 131) and *Eliot v. Allen* (1 C. B. 18) sustain this principle.

Rule refused.

MEMORANDUM.

During this term the following gentlemen were called to the bar: JOHN FARLEY, HUGH M'KENZIE WILSON, ANDREW FRASER SMITH, LEWIS CORYDON MOORE, JAMES FLEMING, JOHN JAMES STEPHENS.

TRINITY TERM, 30 VICT. 1866.

(August 27th to September 8th.)

Present :

THE HON. WILLIAM HENRY DRAPER, C.B., C.J.

„ „ JOHN HAWKINS HAGARTY, J.*

BLAIKIE AND THE CORPORATION OF THE TOWNSHIP OF
HAMILTON.

By-law—Remuneration to councillors—C. S. U. C. ch. 54, sec. 269.

A by-law directing payment of \$30 to each member of a township council, “being \$20 for services as councillor, and \$10 for services for letting and superintending repairs of roads”—*Held* bad, as not within the power given by the Act, C. S. U. C. ch. 54, sec. 269.

THE Corporation of the Township of Hamilton, on the 8th of January 1866, passed a by-law, entitled “By-law to provide for the payment of councillors in the Township of Hamilton for the year 1865,” as follows:—

“Whereas it is necessary to provide for the payment of councillors for the past year,—Be it therefore enacted, and it is hereby enacted, by the Municipal Corporation of the Township of Hamilton, that an order on the treasurer be granted to each councillor for the sum of thirty dollars, being twenty dollars for services as councillor, and ten dollars for services for letting and superintending repairs of roads.”

Hector Cameron, in Easter term last, obtained a rule *nisi* to quash this by-law, on the ground that the township council had no authority to pass it, and that it provides for the payment of illegal and improper charges to the members of the council, and for services for which by-law they are not entitled to any remuneration.

C. S. Patterson, in this term, showed cause, contending

* Mr. JUSTICE MORRISON was absent during this term owing to severe illness.

that the by-law was authorized under the Municipal Act, Consol. Stat. U. C. ch. 54, sec. 269, which enacts that "the council of every township and county may pass by-laws for paying the members of the council for their attendance in council, at a rate not exceeding one dollar and fifty cents per diem;" that all reasonable intendments should be made in favour of the by-law; and that for all that appeared the sums mentioned in it were in fact within the clause, and intended as compensation to the members for their attendance in council, at all events as to the twenty dollars.

Hector Cameron, contra, was not called upon.

DRAPER, C.J.—I am of opinion that this by-law is clearly bad, and I think it better that we should not seem to intimate any doubt in its favour by delaying to make the rule absolute. Such a by-law should show upon its face that it is within the statutory power. Here it does not appear that the money directed to be paid is for the attendance of the members in council, nor if so at what rate; and as to the ten dollars, it is clearly intended as a remuneration not authorized.

HAGARTY, J., concurred.

Rule absolute.

JOHNSTONE v. COWAN.

Statute of Frauds—Contract relating to land.

Defendant held a note of one S. for \$980, given to the plaintiff for land, in relation to which land a suit was pending in Chancery by the plaintiff against S. They met in order to settle. The plaintiff requiring first to be relieved from the note, which he had indorsed. S. agreed to give a mortgage to defendant on certain land for \$600, and procure K. to mortgage to him other land for \$380; and defendant agreed, as soon as these mortgages were registered, to give up the note to the plaintiff. The mortgages were made and registered, but there was a previous mortgage on the land, and defendant transferred the note to a third person, who recovered judgment against the plaintiff. The plaintiff then sued defendant for not giving up the note, alleging as the consideration for defendant's agreement that S., at the plaintiff's request, would give defendant the mortgages.

Held, that the contract was within the Statute of Frauds as relating to land, and that being verbal only the plaintiff could not recover.

DECLARATION stated that on the 16th of March 1851

one Sproule had made his promissory note for \$980, payable to plaintiff or order four years after date, and plaintiff indorsed and delivered the note to defendant; that just before and at the time of the promise thereafter mentioned, the plaintiff, in accordance with arrangements between him and Sproule made with defendant's assent, and for good consideration moving from the plaintiff to Sproule, became entitled to be relieved from his liability as indorser on the said note; and thereupon, and before the said note became payable, in consideration that Sproule at the plaintiff's request would execute and deliver to defendant an indenture of bargain and sale by way of mortgage of certain land and premises, containing seventeen and a half acres, part of the south-east quarter of lot 20, in the twelfth concession of Brock (described), with a proviso for redemption on payment by Sproule of \$600, with interest, on the 16th of March 1865, and would procure one Kay to execute and deliver to defendant an indenture of bargain and sale of certain other land, a part of lot 20, in the twelfth concession of Brock (described), for securing to defendant the further sum of \$380, with interest, on the 16th of March 1865, defendant promised that he would deliver up to plaintiff the said promissory note, that it and the plaintiff's indorsement might be cancelled. *Averment*, that in pursuance of the terms of plaintiff's settlement with Sproule, and at the plaintiff's request, Sproule did make a mortgage (as above), and did procure Kay to make a mortgage (as above), which mortgages respectively defendant accepted and received from Sproule; and plaintiff then requested defendant to deliver the said note up to him to have his indorsement thereon cancelled, yet defendant would not deliver the same, but refused, and afterwards transferred the note for valuable consideration to one Robert Johnstone without notice of the facts aforesaid, and Robert Johnstone recovered judgment against the plaintiff for the amount of the note and costs, amounting together to \$694.92, which the plaintiff was obliged to pay, and the plaintiff was put to the costs of his defence.

Pleas.—1. Did not promise. 2. Defendant did not accept and receive the mortgages as alleged.

The cause was tried at Whitby in October 1865, before *Draper, C.J.*

There was abundant evidence given at the trial to be submitted to the jury to establish the case stated in the declaration—

1. That Sproule made a note for \$980 in consideration of some land in favour of the plaintiff, who indorsed it, and that the note so indorsed came into the hands of the defendant.

2. That an agreement was made in presence of defendant and to which he assented, between plaintiff and Sproule, upon a good consideration between them, that the plaintiff should be relieved from liability on the note, which agreement was sworn to be that Sproule should reconvey to the plaintiff eleven acres of land, and should pay the costs of a Chancery suit between him and plaintiff; that defendant should release the plaintiff from liability as indorser on this note; that the plaintiff should abandon the Chancery suit he had instituted against Sproule (relating apparently to the land on account of which the note was given), and should allow two mortgages to be registered on two parcels of land, one being a mortgage upon seventeen and a half acres, part of the land involved in the Chancery suit, and the other a mortgage to be made by one Kay upon another parcel of land.

3. That both the mortgages spoken of were given, were registered, and were received by defendant, and that defendant promised more than once to deliver up the note, excusing himself for not doing so immediately because it was at his brother's-in-law.

4. That defendant transferred the note to a third party, who sued the plaintiff upon it, and recovered judgment against him.

It was objected for defendant that the contract related to land; that it was not in writing, and therefore void; that there was no consideration moving from the plaintiff to defendant, and that if there was any breach of contract

it was between defendant and Sproule; that the evidence did not prove the promise laid in the declaration.

The objections were overruled, leave being reserved to defendant to move for a nonsuit upon them.

The jury found for the plaintiff, \$694.92.

In Michaelmas term *M. C. Cameron, Q.C.*, obtained a rule, calling upon the plaintiff to show cause why a nonsuit should not be entered pursuant to leave reserved.

In Easter term *Robert A. Harrison* showed cause, citing *Donellan v. Read*, 3 B. & Ad. 899; *Poulter v. Killingbeck*, 1 B. & P. 397; *Hallen v. Runder*, 1 C. M. & R. 266; *Seaman v. Price*, 2 Bing. 437; *Griffith v. Young*, 12 East, 513; *Hamilton v. M'Donell*, 5 O. S. 720; *Dale v. Hamilton*, 5 Hare, 369; *Wright v. Stewart*, 6 Jur. N. S. 867; *Griffiths v. Jenkins*, 10 Jur. N. S. 207; *Teale v. Auty*, 4 Moore, 547, 2 B. & B. 99; *Clarke v. Serricks*, 2 U. C. R. 535.

M. C. Cameron, Q.C., contra, cited *Kelly v. Webster*, 12 C. B. 283; *Gross v. Bricker*, 18 U. C. R. 410; *Crow v. Rogers*, 1 Str. 592; *Voy v. Weir*, 9 C. P. 487.

DRAPER, C.J.—It is necessary, in the first place, to have a clear notion of the facts; and from the evidence, and from the uncontroverted statements of counsel, I gather as follows: There had been dealing about land between the plaintiff and Sproule, the latter having got a conveyance of land from the former, for which Sproule gave the plaintiff his note for \$980. It did not appear what the land was. The plaintiff indorsed this note, and it came (how not appearing) into defendant's hands, who was lawful holder. For some cause the plaintiff had instituted a suit in Chancery against Sproule in relation to land, and presumably the land for which this note was given, and a meeting took place between Sproule and the plaintiff, with a view to a settlement. Defendant was present. The plaintiff would not settle unless he was relieved from liability on this note. Sproule agreed to give a mortgage to defendant on seventeen and a half acres of land to secure \$600, and to procure one Kay to give a mortgage to defendant on other land to secure \$380, making

up the amount of the note, and defendant agreed as soon as these mortgages were registered to give up this note, to release plaintiff from liability on it. It was not shown whether all or any of the land to be so mortgaged was part of the land got by Sproule from the plaintiff. Sproule was to reconvey eleven acres to the plaintiff, and to pay the costs of the Chancery suit, which the plaintiff was to abandon. Plaintiff was to allow the two mortgages to be registered, which makes it probable that the land to be mortgaged to defendant was involved in the Chancery suit, and so formed part of the original dealing between the plaintiff and Sproule. No encumbrance was spoken of as existing on the land to be mortgaged; some searches were made, but none was then discovered, though at this trial Sproule admitted he had mortgaged the land to a firm in Toronto. The two mortgages were immediately made and registered without delay, and were then delivered to the defendant, and he was asked for the note. He said he had not got it with him, but he would give it up as soon as he got it from one Thompson, at whose house it was. The plaintiff said he would not stop the Chancery suit until he was relieved from the note. The defendant, instead of giving it up, transferred it, and the holder brought an action against the plaintiff upon it, and recovered judgment.

This action is brought by the plaintiff against the defendant on this agreement, and the declaration contains one count, which substantially states it. Conceding, for argument's sake, that the promise was made to the plaintiff, I can discover no other consideration for it than this, that the defendant was to have security by mortgage upon land for the \$980 due upon the note. It appears to me impossible to hold that this was not a contract and agreement for and concerning an interest in land, and therefore that it comes within the 4th section of the Statute of Frauds. It is an agreement requiring to be evidenced by writing. It was argued for the plaintiff that the defendant's agreement with him was collateral to the contract for the security upon land, and was therefore out of the statute; but the declaration states that defendant promised to give up the note in

consideration of the two mortgages to be given at the plaintiff's request; and the evidence, as far as it goes, leads to no other conclusion. Indeed, if that line of argument were followed out, it might end in establishing that the defendant was not bound to the plaintiff at all. The plaintiff appears to me to be in this dilemma. He cannot show a binding promise without showing the consideration for it; and he cannot prove the consideration without showing that the agreement related to an interest in land, and therefore must be proved by some writing, whereas there was none.

But it was more earnestly pressed that the defendant having received what he stipulated for, the contract was executed, and so the statute will not apply. *Teale v. Auty* (2 B. & B. 99) was referred to. The plaintiff there sold to the defendant growing poles, which defendant cut down and carried away. There was no written agreement or memorandum. The plaintiff declared specially setting out the transaction, and added a count on an account stated. He was nonsuited, and the court held rightly nonsuited; but as it appeared the defendant had, after getting the poles, acknowledged he owed some specific sum for them, a new trial was granted on payment of costs. This case does not assist the plaintiff.

Griffith v. Young (12 East, 513) was similar in principle. The recovery was not upon a count on the contract which related to an interest in land, but for money had and received by defendant to the plaintiff's use. Lord Ellenborough said: "If one agree to receive money for the use of another upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money, if indeed it were not absolutely immoral or illegal, the person so receiving it cannot be permitted to gainsay his having received it for the use of that other." There the consideration between plaintiff and defendant was that P. had paid money to defendant to be paid over by him to the plaintiff; and though the agreement under which P. paid it was null under the Statute of Frauds, this did not alter or affect defendant's liability. The difference between the cases is obvious.

Seaman v. Price (2 Bing. 437) is to the same effect.

In *Buttermere v. Hayes* (5 M. & W. 456), A., the tenant of premises for a term, agreed with B. by parol to give possession to him and to let him become tenant for the remainder of the term, and B. agreed to pay a sum of money towards repairs which A. was then making. B. entered into possession and became tenant, and thereupon refused to pay the sum agreed upon. The court held A. was prevented from recovering by the 4th section of the Statute of Frauds.

In *Cocking v. Ward* (1 C. B. 858) Tindal, C.J., approves of *Buttermere v. Hayes*, and treats it as establishing that a contract, though executed on the part of the plaintiff, yet not being executed on the part of the defendant also (which is the case here before us), is to be considered a contract within the statute when it relates to an interest in land. In that case, however, there was evidence that after the plaintiff had performed his part, the defendant had admitted that he owed the money sued for to the plaintiff, and so the court held the plaintiff could not recover on the special count, but might hold a verdict on a count on an account stated.

Kelly v. Webster (12 C. B. 283) sustains and follows *Cocking v. Ward*.

Green v. Saddington (7 E. & B. 503) was decided on the ground that after the contract directly concerning the interest in the land had been executed on *both* sides, a separate promise to be performed after such execution would not be within the statute, and an action was maintainable upon it.

Hodgson v. Johnson (E. B. & E. 685) is the last case I shall notice as confirming the previous decisions. The judgment of *Crompton, J.*, covers the whole ground in this case: "Here is only one contract and one consideration. The contract, therefore, must be sued upon as a whole; and, taken as a whole, it relates to the sale of an interest in lands, and is voidable under the Statute of Frauds."

I am of opinion that the rule to enter a nonsuit must be made absolute. It does not appear that the defendant, though the mortgages have been delivered to him, has

received or entered into possession of that for which he contracted to give up the promissory note. The premises mortgaged to him, or part thereof, had been, according to Sproule's evidence, previously mortgaged to a firm in Toronto. There is no ground for inferring that defendant was to accept a second mortgage as the consideration moving to him.

HAGARTY, J.—I am unable to distinguish this case from *Hodgson v. Johnson* (E. B. & E. 685). *Lord Campbell* says, "There is but one consideration for the whole contract; and, though part of that contract may have been performed, the consideration remains entire, and therefore such part performance will not enable plaintiff to sue in respect of that part of the contract that remains unperformed. In an action upon that, he would have to prove the promise by proving the whole of the original agreement; and that agreement, as a whole, is voidable under the Statute of Frauds."

If we follow this case, decided in 1858, we cannot uphold the plaintiff's claim. There are many expressions scattered through the cases, as to performance taking the case out of the statute, which support the plaintiff's view; but this case seems so express that I think in this court, at least, we should follow it.

Green v. Saddington (7 E. & B. 503) is specially distinguishable as containing two collateral promises. *Kelly v. Webster* (12 C. B. 283) is also against the plaintiff's right to recover.

Rule absolute.

GRAHAM v. M'ARTHUR.

Temperance Act of 1864—28 Vict. ch. 22—Effect of—Action against J. P.—Quashing conviction—C. S. U. C. ch. 126, secs. 3, 17—Proof of conviction.

“The Temperance Act of 1864,” and the 28 Vict. ch. 22, for the punishment of persons selling liquor without licence, are intended to stand together. The first is limited to municipalities where a Temperance By-law is in force, and suspends the second there during the continuance of such by-law, leaving it to apply elsewhere in U. C.

Therefore where defendant sitting alone as a magistrate convicted the plaintiff for selling liquor without a licence in a township where such a by-law was in operation, *Held*, that he was liable in trespass, for the Temperance Act gives jurisdiction only to two justices.

Held also, however, that the conviction, though void, must be quashed, under Consol. Stat. U. C. ch. 126, sec. 3, before such action would lie.

The warrant of commitment directed the plaintiff to be kept at hard labour, which the Temperance Act does not authorize. The turnkey swore that the plaintiff “did no hard work in gaol.” *Held*, not sufficient to negative that he was put to some compulsory work, so as to bring defendant within sec. 17 of the last-mentioned Act.

Seemle, that a conviction returned under the statute to the Quarter Sessions and filed by the clerk of the peace, becomes a record of the court, and may be proved by a certified copy.

THE first count of the declaration stated that defendant unlawfully, wrongfully, and maliciously, and without reasonable or probable cause, assaulted the plaintiff and caused him to be put into gaol, and kept him imprisoned for thirty-two days. The second count was in trespass for assault and false imprisonment. *Plea*, not guilty, by Consol. Stat. U. C. ch. 126, and 28 Vict. ch. 22.

The case was tried at London in April 1866, before *Morrison, J.*

The plaintiff called a brother of the defendant as a witness, who stated that he was a constable, and arrested the plaintiff under a warrant signed by the defendant, of which the following is an exact copy :—

PROVINCE OF CANADA, } To all or any of the constable
COUNTY OF MIDDLESEX. } or peace officers in the said
county of Middlesex, and to the keeper of the common
gaol of the said county of Middlesex :—

“Whereas, on the twenty-six day of June last past, complaint was made before the undersigned, one of Her Majesty’s justices of the peace in and for the said county of Middlesex, for that Dugald Graham, of the township of Lobo, in the county of Middlesex aforesaid, on the sixteenth day of May last past, at the township of Lobo, in the county of Middel-

sex, did sell fermented or spirituous liquors to Alexander M'Kellar, of the said township of Lobo, without licence duly issued by the competent authority, contrary to the form of the statute in said case made and provided, namely, twenty-eight Victoria, chapter twenty-two. And whereas afterwards, on the fifteenth day of July, in the year aforesaid, I, the said justices, issued a warrant to all or any of the constable or other peace officers of the said county of Middelsex, commanding them, or any of them, to levy the sum of forty dollars for fine, and the further sum of eighteen and seventy cents for costs, by distress and sale of the goods and chatels of the said Dugald Graham. And whereas it appears to me, as well by the return of the said warrant of distress of the constable charged with the execution of the same as otherwise, the said constable hath made diligent search for the good and chattles of the said Dugald Graham, but no sufficient distress whereon to levy the sum above mentioned could be found. These are therefore to command you to take the said Dugald Graham and him safely convey to the common gaol of the said county of Middelsex, at London aforesaid, and there deliver him to the keeper thereof together with this precept. And I hereby command you, the said keeper of the said common gaol, to received the said Dugald Graham unto your custody in the said common gaol, there to imprisoned him and keep him at hard labour for the space of thirty days, unles the said sum and and all the costs and charges of the said distress and of the commitment and conveying of the said Dugald Graham to the said common gaol be sooner paid up unto you, the said keeper, and for you so doing this shall be your sufficient warrant. Given under my hand and seal on the eleventh day of August in the year of our Lord one thousand eight hundred and sixty-five, at Lobo, in the county of Middelsex aforesaid."

An information was put in on the part of the defendant, laid on oath by one Thomas Douglas, whom the constable described as "the public informer under the Dunkin Act." A conviction bearing date the 15th July 1865 was also put in on the defence, certified by the clerk of the peace under his hand and the seal of the court of general quarter sessions of the peace for the county of Middlesex, to be a true copy of the conviction filed in the office of the clerk of the peace in and for the county of Middlesex, on the 8th of August 1865. The plaintiff appeared to the summons, but the witnesses against him did not, and the case was then

adjourned. He did not attend on the adjournment. Witnesses were examined and plaintiff was convicted. The plaintiff was committed to gaol under the warrant, and remained in custody until the 27th September. His eyes were bad when he was committed, and grew worse. He did no hard work in gaol; was locked up in the cell.

The plaintiff also put in a by-law for the prohibition of the sale of intoxicating liquors in the township of Lobo, passed 3rd December 1864, signed by the defendant as reeve of the township. The informer Douglas was the only witness for the defence. He said that he urged the defendant to send the plaintiff to gaol. This witness said he would have got half the fine; and by the conviction the costs, \$18.75, were ordered to be paid to him.

At the close of the plaintiff's case it was objected, and the objections were renewed at the close of the defence, that the first count being an action on the case, the plaintiff was bound to prove want of reasonable and probable cause; that the second count being in trespass must fail; that the plaintiff was properly convicted under the 28 Victoria, ch. 22, which subjects any person who, without licence duly issued by the competent authority, sells any spirituous or fermented liquors, to be drunk in any ale-house, beer-house, or other house or place of public entertainment, or without such licence sells by retail any such liquors in any shop, store, or place other than an inn, ale-house, etc., to a penalty of not less than \$10, nor more than \$50, with costs. Such offender may be convicted upon the oath of one or more credible witness or witnesses before any justice of the peace having jurisdiction in the place in which such offence is committed. The convicting justice may issue a warrant of distress, and if no sufficient goods are found the justice may commit the offender for not less than thirteen nor more than thirty days to the common gaol. One-half the penalty is given to the informer.

For the plaintiff it was objected that the commitment did not warrant the conviction; that the offence, under the evidence, was not against the statute 28 Vict. ch. 22, but against "*The Temperance Act of 1864*," sec. 12, which provides

that from the day on which a by-law under that Act takes effect, and so long as it continues in force, no person shall within the locality to which such by-law applies expose or keep for sale, or directly or indirectly sell or barter, or in consideration of the purchase of other property give, to any other person, any spirituous or other intoxicating liquor; that the 13th section imposes a penalty for the violation of the 12th section, and the 14th section, sub-sec. 3, gives jurisdiction to *two*, not to *one* justice of the peace, and the 31st and 32nd sections provide for the imprisonment of the offender; that sec. 11, sub-sec. 2, in effect prohibits the issue of a licence to sell liquors while the by-law continues in force, and therefore the application of 28 Vict. ch. 22, is excluded.

The learned judge reserved leave to defendant to move to enter a nonsuit, if the court should be of opinion that the defendant had authority to convict and issue his warrant; or if the court should be of opinion that the conviction should have been appealed against or quashed, then to enter a verdict for defendant on the second count; or to move to reduce any verdict that might be given to three cents.

The jury found for the plaintiff, damages \$100.

In Easter term *Robert A. Harrison* obtained a rule, calling on the plaintiff to show cause why a nonsuit should not be entered, or a verdict entered for defendant, or the verdict be reduced, pursuant to the leave reserved; or for a new trial for misdirection, on the same grounds as those on which leave to move was given.

Becher, Q.C., showed cause. In addition to the grounds urged at the trial, he contended that there was no legal proof of a conviction, the copy certified by the clerk of the peace not being admissible (Tay. Ev., 4th ed., secs. 1397, 1437, 1438, 1446 *A*; Paley on Convictions, 393, 396, 400, 404; *Haacke v. Adamson*, 14 C. P. 201).

Harrison, contra, cited *Holford v. Dunnett*, 7 M. & W. 348; *Ruthven v. Stinson*, 14 C. P. 181. As to proof of the conviction, C. S. C. ch. 80, sec. 5; C. S. U. C. ch. 33,

sec. 6; *Rex v. Lord George Gordon*, 2 Doug. 593, note; *The Maria das Doras*, 7 L. T. Rep. N. S. 838; *Jeffs v. Day*, 12 L. T. Rep. N. S. 852; *Bruce v. Nicolopulo*, 11 Ex. 132; *Motteram v. Eastern Counties, R. W. Co.*, 7 C. B. N. S. 58; *Lynch v. Clerke*, 3 Salk. 154; *Gray v. M'Millan*, 5 C. P. 400; *M'Lean v. M'Donell*, 1 U. C. R. 13; *Rex v. Hains*, Comb. 337; *Breeze v. Hawker*, 14 Sim. 350.

DRAPER, C.J., delivered the judgment of the court.

On the argument *Mr. Harrison* conceded that he could not sustain the conviction; and he urged that, as there was no malice and no want of reasonable or probable cause for finding the plaintiff guilty of selling spirituous liquor without licence, the first count was not maintained; that the act done was an excess of jurisdiction, and that if the plaintiff had any remedy it was in trespass. He further contended that the 3rd section of ch. 126 of Consol. Stat. U. C. prevented the plaintiff from recovering in trespass, because the conviction which was in evidence had not been quashed; it existed in fact, however unsustainable it might be; and the plaintiff should therefore be nonsuited.

We do not think this case is governed by *Haacke v. Adamson* (14 C. P. 201) as to compelling the plaintiff to elect, for we think that the act of the defendant of which the plaintiff complains was not with respect to any matter within the defendant's jurisdiction as a justice; and trespass, not case, is the only remedy for this illegal imprisonment.

The important question is, whether the selling spirituous liquors by the plaintiff without licence, of which offence the plaintiff was convicted, was, upon the facts proved, an offence against the 28 Vict. ch. 22, or against "*The Temperance Act of 1864*." If the former, the defendant had jurisdiction sitting alone, though he had no power to commit to hard labour; if the latter, he had no authority as a single justice to convict; and we think the latter the right conclusion.

In passing the Act of 1865 (limited to Upper Canada) we do not perceive any proof of intention on the part of the legislature to interfere with the provisions of the Temperance Act of the preceding year. Nor do we think it was designed

to give an option to parties to prosecute under either Act persons who might sell spirituous liquors without licence. Now by the Temperance Act one effect of a municipal by-law in accordance with its provisions is to prevent the issue of licences to sell spirituous liquors within each particular locality. Such a by-law would diminish *pro tanto* the revenue granted by Parliament to the Crown, and as it suspended the issue of licences, would virtually suspend the law which made such licences necessary and provided for their being issued; and those provisions of such law which made the sale of spirituous liquors without licence penal would, as to any act done while such by-law continued in force, be suspended also—not by force of the by-law, but by force of the Temperance Act itself, which not only provided for that suspension of licensing, but expressly enacted penalties for contravention of what it enacted or authorized.

If it were otherwise, and parties might without penalty sell spirituous liquors in townships, etc., where such a by-law is in force, we might feel compelled to hold that the statute of 1865 was intended to remedy this evil. But sections 12 and 13 of the Temperance Act supply all that is necessary, for they provide for the punishment of any parties who sell spirituous liquors within such municipalities by fine enforceable by imprisonment. If a party was possessed of a licence at the time such a by-law came into force, it would not protect him; *a fortiori*, if he sold without any licence he would incur the penalties. The minimum of penalty, and both minimum and maximum of imprisonment, differ in the two Acts, and the Temperance Act contains other provisions, some of them unusually stringent, which are obviously designed to prevent the possibility of offenders against its provisions escaping.

In our opinion these Acts were intended to stand together, the one being limited to municipalities wherein a temperance by-law is passed so long as it continues in force, the other applying wherever in Upper Canada the first has no operation.

As a consequence, the defendant had no jurisdiction whatever without the aid and concurrence of another justice of the peace. Sec. 14, sub-sec. 3, expressly provides that

any prosecution for the penalty may be brought before (among others) any *two* justices of the county wherein the offence was committed. The proceeding before the defendant alone was *coram non judice*. The so-called conviction was made by him without jurisdiction, and the plaintiff can maintain trespass. *Haacke v. Adamson* (14 C. P. 201) appears to us to settle this point.

The warrant, as already pointed out, only directs that the plaintiff shall be imprisoned and kept at hard labour. The evidence of the turnkey that the plaintiff "did no hard work in gaol" is not to my mind a sufficient negative that he was put to some compulsory work. No question on this point was put to the jury, nor was the learned judge requested to ask whether the plaintiff was simply restrained of his liberty. If the defendant relied on the 17th section of Consol. Stat. U. C. ch. 126, he should have taken care, where the adjudication was manifestly illegal, to establish that the plaintiff had undergone no greater punishment than that assigned by law for the offence of which he was convicted.

The difficulty, however, remains that the conviction *de facto* exists. It has never been quashed. The contention is not that the conviction wants any formality necessary to make it valid, but that the defendant as a single justice had not jurisdiction to convict. We think this is so, and that trespass therefore lies. But then comes the 3rd section of the Act for the Protection of Justices, which enacts that no such action shall be brought for anything done under such conviction until the conviction has been quashed; and this enactment seems fatal to the plaintiff's case, for the imprisonment certainly was under this conviction, though the conviction is wholly void.

Rule absolute.*

* At the conclusion of this judgment *Becher, Q.C.*, asked if the court had considered the objection taken to the sufficiency of the proof of the conviction, and which had been relied on during the argument.

The court said that the point had not been overlooked, but that on referring to the notes of the learned judge who tried the cause, they found the certified copy of the conviction had been put in very early during the trial, and there was no note of any objection having been taken to its reception then or during the trial; and further, before the case went to the jury

NEILL v. M'MILLAN.

Action against J. P.—Notice of action—Proof of quashing conviction.

Where a magistrate acts clearly in excess of or without jurisdiction, he is nevertheless entitled to notice of action, unless the *bona fides* of his conduct be disproved, but the plaintiff may require that question to be left to the jury, and if they find that he did not honestly believe he was acting as a magistrate he has no claim to notice.

A notice describing the plaintiff's place of abode as "of the township of Garrafraxa, in the county of Wellington, labourer," without giving the lot and concession, *Held*, sufficient.

To prove the quashing of a conviction on appeal to the Quarter Sessions, it is sufficient to prove an order of that court directing that the conviction shall be quashed, the conviction itself being in evidence, and the connection between it and the order shown. It is not necessary to make up a formal record, for the statute Consol. Stat. U. C. ch. 114, enables the Court of Q. S. to dispose of the conviction by order.

THE declaration contained three counts:—

1. For assault and false imprisonment.
2. That defendant being a J.P., falsely and maliciously, and without reasonable and probable cause, issued a warrant, by virtue of which he caused the plaintiff to be arrested and imprisoned.
3. That defendant being a J.P., having caused the plaintiff to be brought in custody before him, as mentioned in the last count, did as such justice falsely and maliciously, and without reasonable or probable cause, convict the plaintiff of a charge then and there preferred against him, after the plaintiff had been legally acquitted of the same by a bench of magistrates then and there having jurisdiction in the premises, and afterwards falsely and maliciously, and without reasonable or probable cause, did as such justice issue his warrant, and caused the plaintiff to be arrested and imprisoned in the common gaol for twenty days.

leave was expressly reserved to the defendant to move to enter a nonsuit if the court should be of opinion that the defendant had authority to convict and issue his warrant, or if the court should be of opinion that the conviction should have been appealed against or quashed, to move to enter a verdict for the defendant on the second count, or to move to reduce any verdict that might be given to the plaintiff to three cents. No such leave could have been reserved unless with the assent of the plaintiff's counsel, and would have been utterly without meaning if there was no conviction in evidence.

The Chief Justice added that he entertained a strong impression that when a conviction was duly returned according to the statute to the court of Quarter Sessions, and was filed by the clerk of the peace, it became a record of that court, and might be proved as any other similar record, without producing the original.

Plea—Not guilty, by statute Consol. Stat. U. C. ch. 126, secs. 1, 9, 10, and 11.

The case was tried at Guelph, in March 1866, before *Richards, C.J.*

The notice of action was produced, and service of it was admitted. It was headed "To John Alexander M'Millan, of the village of Fergus, in the county of Wellington, one of Her Majesty's justices of the peace in and for the said county of Wellington," and was signed "James Fletcher Cross, of Prince of Wales' Block, St. Andrew's Street, in the village of Fergus, in the county of Wellington, attorney for the said James Neill," and was indorsed "James Fletcher Cross, of Prince of Wales' Block, St. Andrew's Street, in the village of Fergus, in the county of Wellington, attorney for the said James Neill, of the township of Garrafraxa, in the county of Wellington, labourer."

Evidence was then given that one James G. Allan had, on the 19th of June 1865, made a complaint before the defendant against the plaintiff for having, while under hire to him as a servant for a term ending on the 1st of January 1867, on the 17th of June left his employment and refused to return. On this the defendant issued a warrant to apprehend the plaintiff and bring him before defendant, or some one or more of the justices of the peace for the said county. On this warrant the plaintiff was arrested on the following morning, and was brought before the defendant and three other justices of the peace, namely, Messrs. Cattanach, Cull, and Munger. Allan and a person named Smith gave evidence, the substance of which was written down by defendant. His written statement was produced. After hearing the evidence the justices consulted together, and the defendant further wrote as follows: "Ordered that the case be dismissed with costs; and on the vote being taken there were for the dismissal of the case

"James Cattanach, J.P., moves,

"George Munger, J.P., seconds,

"Henry Cull, J.P., voting for,

"John A. M'Millan, J.P., dissenting."

The three former justices were called as witnesses, and

all agreed that this was a true statement of what occurred. They also stated in effect that after this was so entered the defendant said he thought they had come to a wrong decision; and that if a similar case were brought under his consideration, and there were twenty magistrates sitting, he would take the matter in his own hands, and act upon his own opinion independent of their judgment. One or two of the justices said to him, "If it is your intention to do so in future, you can do so at present," and defendant asked if they would give him their consent in writing to dispose of the case as he thought fit. They refused, one of them saying they had already disposed of it. The room had been cleared of all persons but the justices when they began to consult, and while this discussion was going on defendant was still writing. The other persons were then called in, and defendant read over the decision which had been come to by the three, and then read further as follows: "But after the matter had been further talked over, James Cattnach, J.P., and Henry Cull, J.P., gave their consent to allow John A. M'Millan, the presiding magistrate in the case, liberty to decide in accordance with his own judgment in the matter Allan in re Neill; and it is thereby ordered that the defendant pay a fine of one dollar and the costs, amounting to six dollars, forthwith, or in default to be imprisoned in the common gaol at Guelph for the space of twenty days, and that he, the said James Neill, is still a servant of the complainant James Allan.

"(Signed) JOHN A. M'MILLAN, J.P."

The others on hearing this objected, saying that was not their decision; that the decision was that the case was dismissed. Defendant replied, "Too late," that the court was dismissed; and he picked up the minute-book and the statutes, and left the room.

The constable said he had the plaintiff in charge on the first warrant until he got a second, dated the 20th of June, on which he arrested the plaintiff and took him to gaol. This second warrant was issued by defendant under his hand and seal. Defendant told the constable as he left the room after reading the decision that he gave the plaintiff

three hours to pay the money, and the constable was to keep him in charge.

It was proved that Garrafraxa is one of the largest townships from east to west of any in Canada, being about twenty miles long, and contains several villages.

It further appeared that on the 22nd of June the defendant was served with notice that the plaintiff appealed against this conviction, and an order under the seal of the Court of Quarter Sessions, and signed by the clerk of the peace, was produced. It was as follows:—

“In the Court of General Quarter Sessions of the Peace for the county of Wellington. On the twelfth day of September, in the year A.D. 1865.

“James Gibbie Allan against James Neill. On the case being called, and notice of appeal proved and heard, it was ordered by the court that the conviction of James Neill be quashed with costs.

“[Seal.]

(Signed) THOMAS SAUNDERS,

“Clerk of the Peace.”

“Office of the Clerk of the Peace, Guelph, March 19, 1866.”

The clerk of the peace also produced the minute-book of entry of proceedings at the Court of Quarter Sessions on the 12th of September 1865. The following is a copy:—

“In the Court of Quarter Sessions for the county of Wellington. At a General Court of Quarter Sessions of the Peace for the county of Wellington, held at Guelph on Tuesday the 12th day of September, in the year of our Lord one thousand eight hundred and sixty-five, pursuant to statute.

“Present, Archibald M'Donald, Esquire, County Court Judge, chairman; James Hough, David Allan, John Beattie, James Loughrem, Esquires, justices of the peace for the county of Wellington.

“The following appeal was entered: James Gibbie Allan against James Neill, Master and Servant's Act. James Neill appellant.

“The service of notice of appeal was admitted. The order of the court was, that the conviction of James Neill be quashed with costs.

“THOMAS SAUNDERS, *Clerk of the Peace.*”

Mr. Saunders stated there was no jury impannelled. There was no trial on the merits.

The defendant's counsel took several objections, which were afterwards renewed in this court.

For the defence, Allan, the employer of the plaintiff, was called, and gave evidence to sustain the conviction as actually made by the defendant, showing that Neill was under an agreement to serve him, and left against the will of Allan. He further said, that what made him force plaintiff was that plaintiff said Allan owed him \$23, and Allan said he did not owe him; and that's what made Allan take plaintiff up. Allan swore he believed it was defendant's doing the warrant was issued in the first instance.

The learned judge told the jury that if they were satisfied that the defendant issued the warrant of commitment in good faith, intending to act as a magistrate, they should find in his favour on the first and second counts. If not satisfied that he was acting in good faith, to find for the plaintiff on the first count and for defendant on the second, and in that view the learned judge inclined to think they might also find for the plaintiff on the third count. As to this count, he told the jury that if the defendant issued the warrant of commitment after the other magistrates in his presence had declared that they had dismissed the complaint with costs, then he issued it without reasonable and probable cause, and they should find for the plaintiff if they thought the defendant acted maliciously. If on the third count they thought the plaintiff entitled to a verdict, they should say whether Neill committed the offence charged against him, and if so they might, according to the statute, limit the verdict to three cents.

The defendant's counsel excepted to the charge.

The jury found for the plaintiff, damages \$100, and said they did not think the defendant honestly believed he was acting as a magistrate at the time. The plaintiff elected to take the verdict on the first count, and the verdict was so entered for him, and for the defendant on the second and third counts.

nisi for a nonsuit, or for a new trial, the verdict being contrary to law and evidence, and for misdirection, and the reception of improper evidence; the misdirection being in leaving it to the jury to say whether the defendant believed he was acting as a justice of the peace, when the evidence showed, and the learned judge should have ruled, that he was so acting, and the plaintiff having failed to prove malice, a nonsuit or verdict for the defendant should have been directed; and in ruling that the notice of action was sufficient, and that there was legal evidence of the quashing of the conviction under which the plaintiff was imprisoned; and in telling the jury that the plaintiff having been acquitted by three magistrates, the defendant had no right to convict the plaintiff, although no record of such acquittal was made; and in not telling the jury that no legal evidence of the acquittal against the record of conviction was given, and that the conviction was legal; and the reception of improper evidence being in admitting evidence of the minute-book of the Quarter Sessions to show the quashing of the conviction, without any formal record of the judgment or decision having been made up, and no legal or formal record of such proceedings being produced.

In this term *Robert A. Harrison* showed cause, citing *Wedge v. Berkeley*, 6 A. & E. 663; *Osborn v. Gough*, 3 B. & P. 551; *James v. Saunders*, 10 Bing. 429; *M'Cance v. Bateman*, 12 C. P. 469; *Moran v. Palmer*, 13 C. P. 528; *Helliwell v. Taylor*, 16 U. C. R. 279; *Connors v. Darling*, 23 U. C. R. 541; *Rex v. Hains*, Comb. 337; *Tay. Ev.* 2nd ed., secs. 1390, 1391, 1408, *Tidd. Prac.* 28.

M. C. Cameron, Q.C., showed cause, citing *Rex v. Ward*, 6 C. & P. 366; *Rex v. Smith*, 8 B. & C. 341; *Rex v. Bellamy*, Ry. & Moo. 172; *Prestidge v. Woodman*, 1 B. & C. 12; *Hazeldine v. Grove*, 3 Q. B. 997; *Kirby v. Simpson*, 10 Ex. 358; *Weller v. Toke*, 9 East, 364.

DRAPER, C.J., delivered the judgment of the court.

The first question that arises regards the notice, whether under the facts appearing the defendant was entitled to it, and if so, was the notice served defective?

When the act of a justice of the peace is either clearly an

excess of jurisdiction or an act not within his jurisdiction, he will nevertheless be entitled to notice, unless it be established to the satisfaction of a jury that he did not *bonâ fide* intend to act, or did not believe he was acting, within his jurisdiction. He may act professedly as a justice, using the forms of proceeding in that character, and yet do that which he is fully conscious he has neither power or authority to do, but which under the influence of sinister motives he is resolved to do.

Still, at the trial of an action brought for such an act he may set up a claim to notice, and if it has not been proved may ask the judge to nonsuit. We apprehend the judge will not assume that the defendant acted *malâ fide*, and in a case coming within the letter of the second section of the Act for the Protection of Justices (Consol. Stat. U. C. ch. 126) he would, as a matter of law, rule that the defendant was entitled to notice; but the plaintiff has the right to require that the question of *bonâ fides* should be submitted to the jury, and in *Wedge v. Berkeley* (6 A. & E. 663) *Lord Denman, C.J.*, said that if the jury found against the defendant on that point he should say notice would be unnecessary. In this case that question has been submitted to the jury, and they have answered it adversely to the defendant.

In *Hazeldine v. Grove* (3 Q. B. 997) the plaintiff did not ask to have this question submitted to the jury, and in *Kirby v. Simpson* (10 Ex. 358) the Act was held to come within the first section of the statute, and then he is entitled to notice; and in *Prestidge v. Woodman* (1 B. & C. 12), where the justice acted upon a subject-matter of complaint over which he had no authority, but which arose out of his jurisdiction, he was also held entitled to notice. But it is difficult to see upon what ground of reason or justice a magistrate who does a wrongful act, and who (as this jury have found) did not honestly believe he was acting at the time as a magistrate, can claim the protection which the legislature intended for justices of the peace acting in the execution of their duty. Although there are dicta in some cases which are not wholly consistent with our conclusion, we have, on full consideration, adopted the opinion expressed

by *Lord Denman*, that after the finding of the jury this defendant had no claim to notice of action.

But we have also considered the objection to the notice given, namely, that the description of the place of abode of the plaintiff, as indorsed thereon, is not sufficiently particular. He is described as "of the township of Garrafraxa, in the county of Wellington, labourer."

The nearest case to the present which we have seen is that of *Osborn v. Gough* (3 B. & P. 551), where the description of the place of abode was A. B., "of Birmingham," and the court held it sufficient. We fully appreciate the distinction between the compactness of a town and the extended surface of a triangular township, perhaps twenty miles long, and on the side opposite the apex as much as twelve, and within which there are three or more villages; and yet we think it probable that Birmingham contained more houses and a larger population, among which it would be as difficult to find an individual labourer as in Garrafraxa; but this consideration does not in our mind outweigh the observation of *Lord Alvanley*, that if the place indorsed on the notice be the true place of the (plaintiff's) abode, it lies on the defendant to show that such description has not afforded him the opportunity of taking advantage of the Act, *i.e.* by tendering amends. It is urged that the lot and concession should be added to show the place of abode, but a mere labourer might, especially in harvest-time, be changing from one lot to another; and when it is remembered that the attorney's place of abode or business is minutely given, and that the tender of amends may be made to him, and that under sec. 50 of the Common Law Procedure Act of 1856 further information as to the plaintiff could be enforced from his attorney, there appears no good reason for so rigid a construction of the Act as is contended for. We have no wish, and no right, to narrow the protection given by the statute in any particular, but its general provisions are so wide that we are not called upon to extend them by construction; and in construing the words "place" of abode, we think we are taking the right course in holding that if there be a literal compliance, coupled, as in this case, with that which shows that the defendant could not

have been prejudiced as to the opportunity of tendering amends, it is enough.

Then as to the evidence of the quashing of the conviction, ch. 114 of the Consol. Stat. U. C. enacts (sec. 1) that an appeal shall lie in certain cases of summary convictions before justices to the Court of Quarter Sessions, "and such court shall at such sessions hear and determine the matter of such appeal, and make such order therein, with or without costs to either party, as to the court seems meet." Chapter 75 gives an appeal to the Quarter Sessions in a case such as was before the justices in this case.

It sufficiently appears that the conviction of the plaintiff on which the defendant relies was returned to the Quarter Sessions. The clerk of the peace produced in evidence at the trial the information, conviction, and notice of appeal with affidavit of service. It was his duty to file the justice's return among the records of his office; and, as I have expressed my opinion in another case, when so filed the conviction became one of such records.* The order above set out was produced under the seal of the court as well as the original minute-book. There were, as the clerk of the peace swore, no other documents filed in his office relating to this matter. The defendant relied on the conviction as his protection, because it was not proved to be quashed.

The case of *Regina v. Yeoveley* (8 A. & E. 806) appears to us to have a material bearing on this question. There the Court of Quarter Sessions had on appeal quashed an order of removal, subject to the opinion of the Queen's Bench; and to prove that an order of removal was discharged on appeal at a previous sessions many years before, the original sessions-book containing those proceedings was produced. No other record but that book was kept. The minutes of each session were headed with an entry containing the style and date of the sessions and the names of the justices in the usual form of a caption, and it contained a statement of the subject of the appeal and the order made on hearing it, and at the end of the proceedings of the session it was signed, "By the Court, J.C., Clerk of the

* See *ante*, page 484, note*.

Peace." The Court of Queen's Bench held this was proper evidence of that former order of sessions.

The evidence in our case was not so decisive in one particular, namely, that no other record was kept of the proceedings except the minute-book, though there was no suggestion or pretence that there was any other; nor was there evidence of any practice in the Court of Quarter Sessions of receiving that book as evidence. And there is also a well-settled distinction between proving the record of a different court from that in which the evidence is offered and a record of the same court. A court will look at its own minutes when sitting under the same commission, when another court would require more formal proof, and the plaintiff in this case has to prove the act or order of the Quarter Sessions.

It might be going too far to hold that the minute-book of the Quarter Sessions produced at this trial was sufficient proof *per se* of the quashing this conviction, for it was not proved that no other or more formal record was kept although this entry had an apparently proper caption, and was signed by the clerk of the peace. A different rule would no doubt prevail as to indictments, verdicts, and judgments in criminal matters at the Quarter Sessions, but this is a particular statutory jurisdiction conferred, and not referred to in the commission of the peace, nor existing at common law. We by no means wish to be understood as holding it to be insufficient, especially if the further proof were added that in practice no other record is kept or made up; but we do not feel compelled to rely upon it, for the statute authorizes the Court of Quarter Sessions to dispose of the appeal "by such order as to the court shall seem meet." There is independent proof of the conviction and of the appeal; the decision on the appeal is all that remains to be proved; and an order to the form of which as an order of court no exception has been taken, which is sealed with its seal and signed by its clerk, is produced, by which it is ordered that the conviction of the plaintiff be quashed with costs. We think this is sufficient.

The cases relied on for the defendant on this point are answered by *Lord Denman* in the judgment referred to, and

Williams, J., said, "No instance has been adduced in which it has been held necessary to make up a formal record of the judgment of Quarter Sessions on an appeal. It is said that if such an adjudication might be proved as it was here, a judgment of transportation might be proved in the same manner; but the indictment with a minute indorsed upon it would be no proof of a valid judgment, for reasons which do not apply to this case. And in the case of an indictment for perjury" (referring to *Rex v. Ward*, 6 C. & P. 366, which was cited by Mr. Cameron), "the possibility of the offence having been committed would depend upon the court having had jurisdiction; consequently there must, in that instance, be such a record as would show jurisdiction. But here the whole question was as to the order made at sessions."

In modern times the legislature have relaxed the strictness of the rules of evidence as to proof of judgments, convictions, etc. A certificate containing the substance and effect only of the indictment and conviction for a previous felony, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same, although the consequence to the offender would be a much severer punishment (Consol. Stat. C., ch. 99, sec. 73).

We do not think we should require a greater amount of proof than that of an order of sessions directing that the conviction in question should be quashed, the conviction itself being also in evidence, and the connection between it and the order being shown, and in fact not disputed.

We think this rule should be discharged.

Rule discharged.

HUSKINSON *v.* LAWRENCE.*Landlord and Tenant*—11 Geo. II. ch. 19, sec. 16.

A landlord may proceed under 11 Geo. II. ch. 19, sec. 16, though the lease contains no proviso for re-entry.

EJECTMENT.—The plaintiff claimed under a lease to himself from the defendant. The defendant, besides denying the plaintiff's title, set up title under a devise to him from one Orange Lawrence deceased.

The trial took place at Toronto, before *Draper, C.J.*

The plaintiff proved a lease, dated the 15th of December 1862, to himself of these premises, to hold for any term not exceeding five years from date, at a fixed rate; if the lessee should leave before the end of the five years, he was to give three months' written notice before leaving, with various provisions as to the cultivation, etc. There was no provision for distress or re-entry for conditions broken.

The plaintiff proved he had been in possession from January 1863, and raised two crops; that he then did not cultivate, and it lay waste one summer, and he had not used it since; and an admission by the defendant that he had put the plaintiff out of possession.

For the defendant it was objected that the lease was determinable by the plaintiff's own act, and he showed himself out of possession, and that he left voluntarily. It was proved that the plaintiff was in possession till the spring of 1865; that fences were down, the place left as a common, orchard-trees cut down, etc. A seizure was made for the first year's rent, for the second only a very small amount was available.

The defendant then proved certain proceedings before two magistrates, under 11 Geo. II. ch. 19. 1st, The record of the proceedings, showing the information laid by the lessor, dated the 17th of January 1866, setting out the claim that over a year's rent was in arrear; that the plaintiff had deserted the premises, and left them uncultivated, and no sufficient distress found; that the justices viewed the premises and found the complaint true, and affixed the notice (produced) that they would return on the 3rd of February following; that on that day they did return, and again viewed the premises; that the plaintiff did not appear,

and no sufficient distress, and they accordingly put the defendant into possession under the statute.

In answer to this the plaintiff objected that the defendant could not set up a forfeiture of the lease under his notice of title; that the lease contained no proviso for re-entry, and therefore the proceedings under the statute were void.

The learned judge reserved leave to the plaintiff to move to enter a verdict for him on these points, and directed a verdict for the defendant.

In Easter term *Read, Q.C.*, moved, but only on the question arising on the statute of Geo. II. During this term *M^r Michael* showed cause, citing *ex parte Pilton*, 1 B. & Al. 369; *Edwards v. Hodges*, 15 C. B. 477, 488, 489; *Basten v. Carew*, 3 B. & C. 649; *Regina v. Sewell*, 8 Q. B. 161; *Ashcroft v. Bourne*, 3 B. & Ad. 684.

Bull supported the rule, citing Arch. L. & T. 172.

HAGARTY, J., delivered the judgment of the court.

We have a difficulty in disposing of this case which cannot arise in England, since the passing of an Act in aid of the Act of Geo. II. not in force here. We have to decide whether the defendant can justify under the 11 Geo. II., there being no right of re-entry reserved in the lease.

Jervis, C.J., in *Edwards v. Hodges* (15 C. B. 477, 489), says, "The history of the transaction seems to have been this: In 1801 *Lord Kenyon* was supposed, in an anonymous case, to have held that the 11 Geo. II. ch. 19, sec. 16, applied only to cases where there was a lease reserving to the lessor a power of re-entry on non-payment of the rent. Notwithstanding that decision, I find the forms in every succeeding edition of Burn's Justice omit all notice of such a power. And in 1817, the objection being taken before *Lord Ellenborough* in *ex parte Pilton* (1 B. & C. 369), he observes, 'The 16th clause says nothing about a power of re-entry.' He then goes on, 'It is true there must be in fact such a power, according to the cases cited as determined by *Lord Kenyon*. But that power does appear by the affidavits to exist in this case.' That can hardly be called

an expression of approval of the doctrine ascribed to *Lord Kenyon*. In this state of things the 57 Geo. III. ch. 52, was passed, probably occasioned by the alarm created by such a construction of the former statute."

Maule, J., says, "In passing the 57 Geo. III., the legislature were not in any degree interfering with the construction of the 11 Geo. II. ch. 19; they were altogether dealing with the future. It is not treating the legislature fairly to say that the language of the 57 Geo. III. ch. 52, leads to an inference that they thought that a power of re-entry was necessary to bring a case within the 11 Geo. II. ch. 19." Counsel proceeds to argue that *Lord Ellenborough* evidently approved of *Lord Kenyon's* decision; at all events, he acted on it. *Crowder, J.*, says, "And its correctness is recognised by the legislature." *Jervis, C.J.*, "The plaintiff objected at the trial that a power of re-entry was necessary. I held not, but I reserved the point. The 57 Geo. III. had not then been adverted to."

The case went off on another point, and the question before us was not formally decided. There is very little to be found except what is mentioned in this case. In *Woodfall, L. & T.* 864, ed. 1840, it is said, "*Lord Kenyon* thought as the preamble of the clause spoke of the expense and delay to which landlords were put in bringing ejectments, that the clause applied only to cases where the landlord *could* support an ejectment."

The 57 Geo. III. ch. 52, does not declare the law. It recites the 11 Geo. II., and adds that the remedies thereof shall be extended (amongst the other cases) to tenants who shall hold "under any demise or agreement, either written or verbal; and although no right or power of re-entry be reserved or given to the landlord in case of non-payment of rent, who shall be in arrear for one half-year's rent, instead of for one year, as in the said recited Act is provided and enacted."

In a note in *Comyn's Landlord and Tenant*, 509, speaking of *ex parte Pilton*, it says, "As to the right of re-entry, it seems to have been entirely forgotten that the statute 57 Geo. III. ch. 52, gave a right of re-entry, though no such right had been provided for by the parties."

The case stands thus: *Lord Kenyon*, in the anonymous case, expressed his opinion, on the ground, apparently, that because the preamble recited the refusal of tenants to deliver up possession, whereby landlords were put to the expense and delay of recovering in ejectment, therefore the remedy was limited to cases where the landlord could maintain ejectment. This was giving to a remedial statute the narrowest construction of which it was susceptible, a construction based not upon the enactment itself, but upon the preamble to it. *Lord Ellenborough* had not to decide the point, and according to *Chief Justice Jervis*, what he did say can hardly be called an approval of *Lord Kenyon's* doctrine.

No doubt the 57 Geo. III., which unfortunately is not part of our law, removed all question as to this point, but it was passed not for that purpose only, but it introduced several important improvements. It may be fairly used as an argument that at least the point required legislative explanation to remove all doubt. We must take it wholly on the earlier Act.

As to the soundness of *Lord Kenyon's* alleged reasons, drawn from the words of the preamble of this section as to ejectment, *Maule, J.* (in 15 C. B. 484, 485), cites the words of *Chancellor Cowper* from 1. P. Wms. 314: "I can by no means allow of the notion that the preamble shall restrain the operation of the enacting clause; and that, because the preamble is too narrow or defective, therefore the enacting clause, which has general words, shall be restrained from its full latitude, and from doing that good which the words would otherwise and of themselves import; which" (with some heat), his lordship said, "was a ridiculous notion, and instanced the Coventry Act, 23 Car. II. ch. 1, which, if it had recited the barbarity of cutting Coventry's nose, and the enacting clause had been general, viz. against the cutting of *any member*, whereby the man is disfigured or defaced, it might with equal reason be objected that cutting of the lips, or putting out the eye, would not have been within the Act, because not within the preamble."

Jervis, C.J., says, "The best rule for the construction

of statutes is that laid down by *Burton, J.*, in *Warburton v. Loveland* (1 Hudson & Brooke, 648): 'It is a rule in the construction of statutes that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to or inconsistent with any expressed intention or any declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended, or abridged, so as to avoid such an inconvenience, but no further.'" *Jervis, C.J.*, adds, "The court is not bound by an erroneous expression of opinion by the legislature, unless where it takes upon itself to *declare* what the law is (*Dore v. Gray*, 2 T. R. 365)." Again (pp. 488, 489): "The best way to interpret an Act of Parliament is to put the ordinary construction upon words that are plain and intelligible, looking at the preamble if necessary to the elucidation of the meaning of the legislature. But the preamble will not restrain plain and unambiguous words of enactment." In another place he says, "As at present advised, I think a power of re-entry was not necessary."

It seems to us that in the present state of the law we are not so bound by authority as to prevent our placing our own construction on the 11 Geo. II. It recites that landlords are often great sufferers by tenants running away in arrear, and not only suffering the premises to lie uncultivated without any distress thereon, etc., but also refusing to deliver up possession, whereby landlords are put to the expense and delay of recovering in ejectment. It then enacts that if any tenant holding lands, etc., at a rack-rent, etc., who shall be in arrear for one year's rent, shall desert the premises and leave the same uncultivated or unoccupied, so that no sufficient distress can be had to countervail the arrears of rent, it shall be lawful for two justices, etc.; and then gives the remedy.

It is a remedial Act, designed to remedy a very great evil, an evil just as great whether the landlord may or may not have reserved a right of re-entry in his lease; and we can hardly see why we should, with the clear positive words of the enacting clause before us, be obliged to destroy its

usefulness in the numerous class of cases (especially numerous in this land of loose conveyancing) where the right of re-entry is not expressly reserved.

We think the rules applicable to the construction of statutes fully warrant our giving the enacting words their full operation, according to the plain grammatical meaning.

There is a remarkable instance in *Mace v. Cadell* (Cowp. 232), where *Lord Mansfield* adopts an opposite rule of construction to that of *Lord Kenyon*, as to the old Bankrupt Act, 21 Jac. I. ch. 19, sec. 11, where the enacting clause as to goods in the order and disposition of the bankrupt were held not restrained by the preamble, which only spoke of goods conveyed to others by the bankrupt yet still retained in his possession as reputed owner.

We think our judgment should be for defendant, and the rule to enter a verdict for the plaintiff be discharged.

Rule discharged.

AMEY ET AL. v. CARD, MILLIGAN, AND CLEMENT.

Deed of married woman in 1825—Examination and certificate—Statute of Limitations.

In ejectment defendant claimed under a deed from one C. The land had been granted to A., a married woman, and C. proved that in 1825 he got a deed, since lost, from her and her husband, on which was indorsed a certificate of A.'s examination and acknowledgment by two magistrates, both dead, before whom he took her for that purpose. He bought out the interest of one K., who was in possession under an agreement to purchase from A. and her husband, and he paid the balance due to them by K., from whom he received possession. A. and her husband having died within the last five years, their heirs brought ejectment.

Held—1. That the deed passed nothing, for the power to two magistrates to examine and certify was first given in 1831 by 1 Wm. IV. ch. 3.

2. That the plaintiffs were not barred by the Statute of Limitations, for that C., under the circumstances, entered as a purchaser from A. and her husband; that their deed to him being void, he held as tenant at will; and the statute did not begin to run for a year, since which forty years had not elapsed.

Quære, as to the effect of the statute if K. had been merely a trespasser, and C. had obtained possession from him, getting nothing from A. but a void deed.

EJECTMENT for the north half of lot 43, in the 5th concession of Camden. Writ tested 30th May 1865.

Card defended for the west half of the north half, Milligan for forty-eight acres of the east half of the north half. Clement did not defend.

The plaintiffs claimed title as heirs and heiresses of Elizabeth Amey, deceased.

Defendant Card claimed title under a deed from Henry T. Cronkhite, dated 20th June 1826, and by adverse possession of forty years.

Defendant Milligan claimed title under a deed from Robert Haslitt to James Milligan, and as tenant to James Milligan, and by adverse possession upwards of forty years.

The case was tried at Belleville, in March 1866, before *Hagarty, J.*

The plaintiffs put in a grant from the Crown, dated 8th March 1808, of the land in question to Elizabeth Amey in fee, and proved that she died about five years ago, in the fall of the year; that her husband, Israel Amey, died about a year ago (*i.e.* before the trial). The right of the plaintiffs as heirs and heiresses of Elizabeth Amey was sufficiently proved. The grantee and her husband lived forty or fifty years back of Bath, in Ernestown, about twelve miles from this lot.

On the defence a commission to take evidence, executed in the State of New York, with its return, was put in. It contained the evidence of Henry T. Cronkhite, who must, from his statement, have been about eighty-five years old at the time of giving his evidence in December 1865. He swore that he had a deed of the north half of lot 43, in the 5th concession of Camden, which he got from Mrs. Amey; that he thought her name was Elizabeth. He thought her husband's name was Israel. They lived north of Bath. He went with one Jacob Huffman to get the deed. Huffman was indebted to him, and paid Amey the money for the witness, who took Amey and his wife the next day to Bath before two magistrates; that a deed was drawn, and signed by Israel Amey and his wife, as the land was hers, she being the daughter of a United Empire Loyalist; he named the magistrates—M'Kenzie, who lived near Amey's, and Rankin, who, he believed, was custom-house officer; that

Mrs. Amey signed the deed before Rankin and M'Kenzie, both of whom acted as magistrates, and examined her apart from her husband; that Mrs. Amey gave her assent boldly and freely when asked by the magistrates, and her acknowledgment was written on the back of the deed, and they signed their names to the certificate, and he took the deed, which he did not get registered, and put it into a chest, where it remained until his wife's death. After this he removed to the United States, taking the chest with him; and his house was burned, and the chest in it, about twenty-five years ago. He thought the deed was then in the chest.

He swore to two deeds executed by himself, conveying the west half of the premises to defendant Card, and the east half to Henry Burley. (These deeds were afterwards put in on the defence, and their execution was admitted.) He said he bought one Kimball's interest in this lot, and paid the Ameys what Kimball owed upon the lot, and got the deed. He left Canada twenty-nine or thirty years ago. He could not swear he had seen the deed since he brought the chest to the States, but he was certain he had it in the chest. He got it in the spring of 1825. He thought it possible he might have given this deed to a Mrs. Ellerbeck, to whom he did give a deed of land which his wife had owned, and had asked her, but got no information about it.

The execution of different deeds, under which the defendants respectively set up title from Cronkhite downwards, was admitted.

Jacob Huffman swore that he went with Cronkhite in 1825 to the Ameys; that Mrs. Amey would have \$32 for signing the deed to Cronkhite, and he (Huffman) paid it to her husband; that he (Huffman) went home, and the next day Cronkhite came to him bringing the deed, and told him that he had taken Mrs. Amey before M'Kenzie and another magistrate; that Kimball had possession of the whole lot under a bond from Vankleek, who first bought it. Cronkhite succeeded Kimball in possession, and he and those to whom he sold had been in possession ever since. It was a wild lot when Kimball entered, but is now a valuable farm. Huffman swore that M'Kenzie and Rankin were both

magistrates of that county, and that both were dead; that he did not go with Mrs. Amey to the magistrates.

There was evidence of Mrs. Amey's declaration that she had sold to Vankleek, not making any reference to Cronkhite, and that Kimball was in possession before Cronkhite got a deed. Henry Burley swore that he saw a deed purporting to be signed by Amey and wife to Cronkhite, and that this deed was for the north half of No. 43, 5th concession of Camden. He said that his own deed (*i.e.* from Cronkhite) was in the following year drawn or copied from this deed. Various ineffectual searches for the deed to Cronkhite were proved.

There was a doubt at the trial as to the provisions of the statute in force in 1825 enabling married women to convey their real estate. No copy of the statutes was accessible at the time.

The learned judge's direction was favourable to the plaintiffs, and the jury rendered a verdict for them.

In Easter term *George E. Henderson* obtained a rule, calling on the plaintiffs to show cause why there should not be a new trial, on the following grounds: 1. That the verdict was contrary to law and evidence, the defendants having established a good paper title. 2. That forty years' adverse possession was proved by the defendants and those under whom they claimed, with knowledge on the part of the plaintiffs and those under whom they claim. 3. That the learned judge misdirected the jury, in saying that Cronkhite's deed failed by reason that the statute authorizing two magistrates to examine married women apart from their husbands, and to certify their consent, was not in force at the time of the execution of the deed; and (4) in not submitting the time of the granting the certificate by the two magistrates as a question of fact for the jury. 5. And for misdirection, in charging that the defendants' possession could only run from the expiration of one year from the date of Cronkhite's deed, and that a tenancy at will was created at the execution of that deed, and that the statute would not commence to run until one year from that date,

and that defendants could not go behind said deed in claiming forty years' possession, it being an acknowledgment of title in Mrs. Amey by taking her deed, and that the defendants were estopped thereby.

Sir H. Smith, Q.C., showed cause in Trinity term.

Gwynne, Q.C., supported the rule, citing *Doe Corbyn v. Bramston*, 3 A. & E. 63; *Doe Roffey v. Harbrow*, *Ib.* 67, note *a*; *Doe Perry v. Henderson*, 3 U. C. R. 486; *Doe Cuthbertson v. M'Gillis*, 2 C. P. 124.

DRAPER, C.J., delivered the judgment of the court.

There are two general questions: 1. Did any estate pass by the alleged conveyance from Mr. and Mrs. Amey to Cronkhite? If not, then, 2. Are the plaintiffs barred by the Statute of Limitations? And this may involve a different inquiry and answer if the husband's estate passed by that deed, though the wife's did not, from that which will arise if nothing passed by that conveyance.

As to the first question, we look upon the evidence advanced by the defendants themselves as conclusively showing that Mr. and Mrs. Amey did execute a deed of conveyance of this lot to Cronkhite in 1825; and upon the same evidence, coupled with the proof of the grant from the Crown to Mrs. Amey, we feel warranted in assuming that it was a deed purporting to pass her real estate. The evidence of Huffman and of Burley, and the dates of Cronkhite's deeds to Card, the defendant, and to Burley, confirm Cronkhite's assertion as to his getting this deed in 1825. But the execution of that deed before two magistrates, the examination of the wife, and the certificate said to have been given by them, rest upon his testimony alone. Neither Huffman nor Burley speak of the certificate, though Huffman thinks he saw it, and Burley says distinctly that he saw it. Huffman says that Cronkhite told him he had taken her before M'Kenzie and Rankin, but that is merely his assertion. Huffman, however, says they were magistrates.

In 1825 the deed of a married woman of her real estate, executed in Upper Canada by her jointly with her husband and with his consent, neither bound her nor her husband,

nor her heirs, unless she appeared in open court before the King's Bench, or before a judge thereof in Chambers, or before a judge of assize, or before the chairman of the sessions in open court, within a limited time after its execution, and was examined as to her voluntary consent to part with her estate, and a certificate of the examination was indorsed on the deed. Authority was not given to two magistrates to take such examination, or to certify it, until the statute 1 Wm. IV. ch. 3, passed, 16th March 1831.

The first ground on which the rule is rested amounts only to an assertion, which is to be proved. The question is, whether the defendants' paper title is good in law? if not, the verdict is right.

We do not think the third ground is tenable. The deed, we assume, was executed in 1825. The statute authorizing two magistrates to examine and certify was not passed until 1831, and the deed was nugatory unless the married woman was examined before certain named judicial authorities, who were required to certify; but the only examination and certificate asserted or attempted to be proved was not before any of those authorities, and therefore the deed to Cronkhite was void.

We think it quite incredible that six years before the passing of the statute 1 Wm. IV. Cronkhite should have anticipated the action of the legislature, and have prevailed upon two magistrates to exercise powers not conferred upon them; and the fourth ground, however specious, appears to us utterly unsubstantial when the facts are understood. The magistrates had no authority in such a matter until 1831. We have already expressed our conviction that the deed to Cronkhite was executed in 1825; and we do not very well understand how the defendants, who are advancing this deed as the foundation of their paper title, can contest this fact so established by their own witnesses. Every word of the evidence which bears upon the alleged certificate at all shows that it was indorsed on the day the deed was executed; and unless it be meant that the learned judge should have left to the jury to say whether the certificate was not granted until after the Act of 1831 was passed, we

do not understand what is meant; but if that be the meaning, not only was there no evidence to prove this, but the defendants' own evidence, if it proved anything on this point, proved the very reverse.

We are of opinion that nothing passed to Cronkhite by this deed, admitting both that it was executed and the certificate indorsed as he represents; while, if his evidence is rejected, there is no proof of any such deed being executed. Either way the paper title fails.

The second and fifth grounds relate to the Statute of Limitations. It does not appear to us that either Cronkhite or those claiming under him can be heard to assert that he entered and held as a trespasser; for, first, the defendants gave evidence that Mrs. Amey had declared she had sold to Vankleek, who put Kimball into possession, and, secondly, Cronkhite succeeded him, having, as he himself swears, bought Kimball's interest, and paid the Ameys what Kimball owed upon the lot. Having thus got possession as a purchaser from them, as the deed they gave him was void, he would hold as tenant at will to them, and so could not in any sense be deemed to hold adversely until the expiration of a year. In that view the forty years had not expired when the action was commenced.

If there was no proof whatever that Kimball was in possession as a purchaser, and so in privity with Mrs. Amey, it might be different, inasmuch as Cronkhite got the possession from him, and got nothing from Mrs. Amey but a void deed; but Cronkhite's own assertion as to Kimball, and that he paid what Kimball owed of the purchase-money, must, we think, conclude him as entering under Mrs. Amey's title, and that her right of entry on him did not accrue until the expiration of a year from his entry, during which time he held as a tenant at will.

Rule discharged.

BELL v. ANNE MILLS, ROBERT MILLS, AND JAMES ELLIOTT.

Administration bond—Surrogate Courts Act—C. S. U. C. ch. 16.

The Surrogate Courts Act, Consol. Stat. U. C. ch. 16, requires a bond from administrators, "conditioned for the due collecting, getting in, and administering the personal estate of the deceased," and enacts that such bond shall be in the form prescribed by the rules and orders referred to in the 18th section of the Act. These rules were those made under the Surrogate Courts Act, 1858, which by the section referred to "are hereby continued." *Held*, that such rules being thus sanctioned by the legislature, a bond in accordance with the form prescribed by them must be held sufficient, though it was alleged not to comply with the statute. Part of the condition of such bond was, that the administrator should, when lawfully called on, make and exhibit an inventory of all the estate and effects which had or should come into his hands. The first breach alleged was that the judge made an order upon him to bring in forthwith an inventory of the goods, chattels, and credits of the deceased, and that he did not make or exhibit an inventory of the goods which had come into his hands, or any inventory. *Held*, that admitting the order to be too large, it was nevertheless good to the extent of the condition, and that the breach, not going beyond such condition, was also good.

Held, also, that it was unnecessary to show the amount recoverable in respect of such breach.

Held, also, that the non-payment of the plaintiff's judgment against the intestate could not be assigned as a breach of the bond, for the Surrogate Courts Act gives no new remedy for the recovery of debts.

Quære, however, as to the mode of carrying out the provisions of section 65. Per DRAPER, C.J., after joinder in demurrer, the party demurring cannot without consent or leave alter or vary the grounds of demurrer.

DECLARATION, that the defendants, together with one R. W., by their bond, dated 29th August 1864, became bound to Samuel Bealey Harrison, Esq., the judge of the Surrogate Court of the united counties of York and Peel, in the sum of \$1200, conditioned that the said defendant Anne Mills, administratrix of the personal estate and effects, rights and credits of Andrew Elliott, deceased, who died on the 9th day of June 1864 intestate, should, when lawfully called on in that behalf, make or cause to be made a true and perfect inventory of all and singular the personal estate and effects, rights and credits of the said deceased, which had or should come into the hands, possession, or knowledge of the said defendant Anne Mills, or into the hands or possession of any other person or persons for her, and the same so made should exhibit or cause to be exhibited into the registry of the Surrogate Court of the united counties of York and Peel, whenever required by law so to do, and the same personal estate and effects, rights and credits, and all other the personal estate and effects, rights and credits, of the said deceased at the time of his death,

which at any time after should come into the hands or possession of the said defendant Anne Mills, or into the hands or possession of any other person or persons for her, should well and truly administer according to law; that is to say, as declared in and by the condition of said bond, should pay the debts which the said deceased should owe at his decease, so far as such personal estate would thereto extend and the law bind her; and further, should make, or cause to be made, a full, true, and just account of her said administration, when she should be thereunto lawfully required, and all the rest and residue of the said personal estate and effects, rights and credits, should deliver and pay unto such person or persons as should be by law entitled thereto. And the plaintiff avers that the said bond, with the conditions thereunder written, was made and entered into by the said defendants after the passing of "The Surrogate Courts Act," and according to and under the provisions thereof, on the occasion of the defendant Anne Mills obtaining from the said Surrogate Court of the said united counties, letters of administration of all and singular the goods, chattels, and credits of the said Andrew Elliott, deceased, and that the said Anne Mills did thereupon then obtain such letters of administration; and that the said bond is in the form prescribed by the rules and orders referred to in the 18th section of the Surrogate Courts Act. And the plaintiff avers that before and at the time of the making of the said bond, and afterwards, while the said defendant Anne Mills was administrator of the estate of the said Andrew Elliott, divers goods, chattels, and moneys which were of the said Andrew Elliott, deceased, came into the hands and possession of the said defendant Anne Mills, and into the hands and possession of others for her as such administratrix, sufficient to pay and satisfy the claim of the plaintiff, upon which she, the said plaintiff, recovered judgment as herein-after mentioned, as well as all the debts of a higher degree, in due course of administration. And the plaintiff further saith that after the grant of the said letters of administration and the making of the said bond, she impleaded the said defendant Anne Mills in the County Court of the united

counties of York and Peel for a debt which was due and owing to her, the plaintiff, by the said Andrew Elliott, deceased, in his lifetime, and in due course of law recovered a judgment thereon against the said Anne Mills as such administratrix for the sum of \$199·55, being the said debt, and \$116·68 for her costs of suit in that behalf, amounting in all to the sum of \$316·23, to be levied of the goods and chattels of the said Andrew Elliott, deceased, in the hands of the said Anne Mills, as such administratrix as aforesaid to be administered, if she had so much thereof to be administered, and if she had not so much thereof to be administered, then the said costs to be levied of the proper goods and chattels of the said Anne Mills and of the defendant Robert Mills her husband, which said judgment still remains in force.

And for assigning a breach of the condition of the said bond, the plaintiff saith that after the execution thereof an order was duly made in the matter of the said administration, bearing date the 31st day of August, in the year last aforesaid, by the said S. B. H., judge of the said Surrogate Court, and having jurisdiction therein, ordering and requiring of the said Anne Mills, as such administratrix, that an inventory of the goods, chattels, and credits of the said deceased should be made, exhibited, and brought into the said Surrogate Court forthwith after the date of the said order; and although a reasonable time for bringing in the said inventory after the making of said order had long elapsed before the commencement of this suit, yet the said defendant Anne Mills did not, nor would, when so lawfully required, or at any time (as she might and should have done) make, or cause to be made, a true and perfect, or any inventory of the personal estate and effects of the said Andrew Elliott, deceased, which so came into the hands, possession, or knowledge of the said Anne Mills, and into the hands and possession of others for her, or any part thereof, nor exhibit, or cause to be exhibited, any such inventory into the registry of the said Surrogate Court at any time hitherto, but as wholly neglected so to do, contrary to the condition of the said bond.

And for assigning a further breach of the said condition, according to the form of the statute in such case made and provided, the plaintiff saith that the said defendant Anne Mills did not well and truly administer according to law the goods, chattels, and moneys of the said Andrew Elliott, deceased, which so came to the hands of and were received by her the said Anne Mills, as such administratrix as aforesaid, and did not pay the debts which the said deceased did owe at his decease, so far as such personal estate would extend and the law bound her; but, on the contrary thereof, wholly neglected and refused to pay or satisfy the said judgment so recovered by the plaintiff against the said Anne Mills as such administratrix as aforesaid, although she, the said Anne Mills, had sufficient assets to satisfy the same, and the said judgment still remains wholly due and unsatisfied to the plaintiff. And the plaintiff saith that the defendant Anne Mills wrongfully and unjustly, and contrary to the intent and meaning of the said condition, devastated and wasted the said goods, chattels, credits, and moneys, which were of the said Andrew Elliott, deceased, and the same remain unadministered according to law. And the plaintiff further avers that after the said several breaches above assigned, and before the commencement of this suit, the said judge of the Surrogate Court, being satisfied that the condition of the said bond had been broken, did, under the powers conferred upon him by the Surrogate Courts Act, order that the Registrar of the said Surrogate Court should assign the said bond to the plaintiff, and the said bond was accordingly by the said Registrar duly assigned to the plaintiff, under the provisions of the said Act, and she thereupon became entitled, in pursuance thereof, to enforce the said bond in her own name as such assignee; whereby, and by force of the said statute, an action hath accrued to the plaintiff as assignee as aforesaid, to demand from the defendants the said sum of \$1200 above demanded, yet the defendants have not, nor have any or either of them paid the same, or any part thereof.

The defendants demurred to the declaration on ten different grounds, which it is unnecessary to set out. The

plaintiff joined in demurrer, and the following objections to the declaration were afterwards added:—

1. The bond set out is not the bond directed to be signed by sec. 63 of the Surrogate Courts Act, but contains conditions not authorized by that section, and omits or qualifies the conditions which that section requires, and therefore does not come within the provisions of sec. 65 so as to be assignable.

2. Section 65 of the Surrogate Courts Act only authorizes the assignee to recover as trustee for all persons interested the amount recoverable in respect of any breach of the condition. But the said declaration does not show what amount is recoverable in respect of the breach first assigned; and if any amount is shown to be recoverable in respect of the breach secondly assigned, it is only the amount of the debt for which the plaintiff has judgment, yet the declaration claims to recover the whole penalty.

3. That the breach first assigned is insufficient, charging that the administratrix did not make, or cause to be made, a true and perfect, or any inventory of the personal estate and effects of the said Andrew Elliott, deceased, which came into her hands, possession, or knowledge, and into the hands and possession of others for her, or any part thereof, nor exhibit, nor cause to be exhibited, any such inventory unto the registry of the said Surrogate Court, whereas she was only bound by the said condition to make or cause to be made such inventory when lawfully called on in that behalf, and it is not shown that she was so lawfully called upon, the said Surrogate judge having no jurisdiction to make the alleged order, and the alleged order not being in the terms of the said condition, and relating to other goods and effects than those which came into the hands, possession, or knowledge of the said administratrix, and into the hands and possession of others for her; and whereas she was only required by the said condition to exhibit or cause to be exhibited the said inventory whenever required by law so to do, and it is not shown that she was required by law so to do.

4. That the breach secondly assigned is insufficient, for the following amongst other reasons: That the condition set out so far as it relates to the payment of debts is insensible and uncertain, being for the payment of debts which the deceased should owe at his decease, thus referring to his decease as in the future. That the administratrix was only bound to pay the debts so far as the personal estate with which she was chargeable as administratrix would thereto extend and the law bind her; but it is not shown that such personal estate extended to enable her to pay the plaintiff's debt, or that the goods, chattels, and moneys alleged to have come into her hands came into or were in her hands while she was administratrix, but they are alleged to have come into her hands as well before she was administratrix as afterwards, and are not alleged to have been received or had after the death of Andrew Elliott, or to have been his property at the time of his decease; and it is not shown that the law bound the administratrix to pay the plaintiff's debt, but she may lawfully have exhausted the assets in paying others of equal degree.

C. S. Patterson, for the demurrer, cited *The Archbishop of Canterbury v. Robertson*, 1 C. & M. 690; *Brown v. Archbishop of Canterbury*, Lutw. 882; *Archbishop of Canterbury v. Tappen*, 8 B. & C. 151; *Kirchhoffer v. Ross*, 11 C. P. 467; *Wms. on Exrs.* vol. i. pp. 470, 471; *Chitty's Stats.* 2nd. ed. vol. i. p. 135.

Robert A. Harrison, contra, cited *Greerside v. Benson*, 3 Atk. 248, 252, 253; *The Archbishop of Canterbury v. House*, Cowp. 140; *Archbishop of Canterbury v. Willis*, 1 Salk. 172.

The statutes cited are referred to in the judgment.

DRAPER, C.J., delivered the judgment of the court.

This demurrer was filed with ten grounds of demurrer on the 2nd of April 1866. Afterwards, on the 2nd of May, several additional objections appear to have been filed. The plaintiff had joined in demurrer on the 2nd of May, and the joinder is entered before these last objections to the declara-

tion. I apprehend a party has not a right to file or serve his demurrer with his objections, and subsequently, without consent or leave, to vary or withdraw them, or substitute or add others, especially after the opposite party has joined in demurrer. I think it was a very prudent step not to rely on the grounds of demurrer at first stated; for as to the greater part of them at least, I am strongly inclined to think they would have been held frivolous on an application to strike them out.

The demurrer, though in form to the whole declaration, was in argument rested principally on objections to the two breaches assigned. The first, however, involved the validity of the bond and condition, on the ground that they were not in accordance with or sanctioned by the present Surrogate Courts Act.

The declaration avers that the bond is made under the provisions of the Consolidated Statute U. C. ch. 16, and in the form prescribed by the rules and orders referred to in sec. 18 thereof. By sec. 14 of the 22 Vict. ch. 93 (1858) the Governor was authorized to name three judges, who were empowered to make rules and orders for regulating the procedure and practice of the Surrogate Courts, and in relation to their jurisdiction and proceedings under that Act, for regulating the duties of the Surrogate Clerk, of the several Surrogate Court Registrars, and other officers of the court, and for determining what should be deemed contentious and what non-contentious business. The 18th section of the Consolidated Act (which came into force on the 5th of December 1859) enacts that the general rules and regulations made under this 14th section are continued. We take this to have the same effect as the incorporation of those rules into the Consolidated Act, except that they might be from time to time varied or annulled under the powers given by section 19. It is not suggested, however, that any change in them has been made, and the declaration avers and the demurrer admits that the bond is in the form prescribed by the existing rules. Both statutes, in almost precisely similar language, require a bond from every person to whom any grant of administration shall be committed to

the judge of the Surrogate Court from which such grant is made, with one or more sureties, as the judge shall require, conditioned "for the due collecting, getting in, and administering the personal estate of the deceased, and the bond shall be in the form prescribed by the rules and orders referred to" in the 18th section of the Consolidated Act as applicable to this case (Consol. Stat. U. C. ch. 16, sec. 63, 22 Vict. ch. 93, sec. 45). The sufficiency and propriety of the forms as regulated by the rules and regulations existing when the Consolidated Statute was passed has thus the sanction of the legislature, and we must hold that this bond and condition are in accordance with the intention of the Act.

It was next objected that the first breach does not show what amount is recoverable in respect thereof; and that as to the second breach the only amount stated is that for which the plaintiff has recovered judgment, and nevertheless the plaintiff claims the whole penalty. We think the 65th section of the Consolidated Act answers this objection; for it authorizes the plaintiff, if entitled to recover at all, to recover as a trustee for all parties interested the full amount recoverable in respect of any breach of the condition. Moreover, any breach of the condition would involve a forfeiture of the penalty, even if the plaintiff were prevented from taking execution for more than the amount of his damages assessed.

With regard to the first breach, there is an express averment that the "bond with the condition thereunder written was made according to and under the provisions" of the Surrogate Courts Act, and is in the form prescribed by the rules and regulations above adverted to. The condition as set out, and on which this breach is founded, contains an undertaking that the administratrix should, when lawfully called on, make a true and perfect inventory of all and singular the personal estate and effects, rights and credits of the deceased, which had or should come into the hands, possession, or knowledge of the administratrix, and should exhibit the same into the registry of the Surrogate Court. The breach shows an order of the judge that an inventory should be made, exhibited, and brought into the registry of

the court forthwith, and that the administratrix did not make a true and perfect or any inventory of the personal estate or effects of the intestate which so came into her hands, etc., nor exhibit such inventory into the registry of the said court at any time. It is objected that this order is too large. If the breach had alleged a non-compliance co-extensive with the terms of the order, the objection might have had weight; but it follows the words of the condition, and negatives the filing of an inventory of what came to the hands of the administratrix or of any inventory at all. Conceding that the order was beyond the condition, it is in our opinion a good order to the extent of the condition, and then the objection fails.

The second breach is for not duly administering the estate and not paying the debts of the intestate so far as his personal estate would extend, and for not paying the judgment recovered by the plaintiff against the administratrix, although she had sufficient assets to satisfy the same.

The authorities bearing on this question are collected and reviewed by *Lord Lyndhurst* in *Archbishop of Canterbury v. Robertson* (1 Cr. & M. 690), who deduces therefrom two conclusions—first, that creditors may sue upon the bond where the inventory has not been delivered; and, second, that the non-payment of creditors cannot be assigned as a breach; and referring to *Lord Holt's* judgment in *Archbishop of Canterbury v. Wills* (1 Salk. 315), he explains it to mean that a creditor shall not sue for his debt upon the administration bond, even if he suggests a devastavit. The creditor has the ordinary remedy by judgment and execution, and must enforce that to obtain satisfaction, and we see nothing in the Surrogate Courts Act which gives a new remedy for the recovery of debts; though the creditor being authorized to obtain an assignment of the bond, and to sue in his own name, and not in the name of the obligee, there may be found difficulties in the way of obtaining a distribution by other creditors who cannot sue upon the bond. The statute makes the creditor recovering on the bond a trustee for all persons interested; but whether he is to collect the full penalty, and pay himself in full, without regard to other

claims, or to hold it for distribution according to the course of administration, and if so, in what manner he or other parties having claims on the estate are to regulate and adjust them, are among many questions that may arise, and which do not appear to be provided for by the statute, unless by making the creditor who gets judgment on the administration bond a trustee, as already pointed out. We are of opinion that this breach cannot be upheld.

The plaintiff is, however, entitled to judgment on the demurrer, except as respects the second breach, upon the demurrer to which the defendant succeeds.

Judgment accordingly.

DEVERILL, ADMINISTRATRIX OF DEVERILL v. THE GRAND TRUNK RAILWAY COMPANY.

Master and servant—Negligence of fellow-servant—Liability of master—Evidence.

Action against a railway company for the death of one D., an engine-driver in their employment, alleging that they negligently employed one R., an incompetent person, as switchman, and that by his incompetency the collision occurred. It appeared that R. neglected to raise the semaphore at the east end of Stratford Station, so as to prevent D.'s train going west from entering the yard while a freight train was coming from the west, and this caused the accident. According to the testimony on both sides, R. was an intelligent man, employed at work which one witness said could be learned in a day, another in two or three weeks, and after being a week about the yard he had performed this work regularly for two weeks without complaint until this occasion. A verdict having been found for the plaintiff—

Held, that there was no evidence to go to the jury that defendants negligently employed an incompetent person; that for R.'s neglect, he being D.'s fellow-servant, the plaintiff clearly could not recover, and a nonsuit was ordered.

ACTION for the death of Edward Deverill, employed by defendants as an engineer, alleging that the defendants negligently employed one Ryan as switchman at Stratford Station, being an incompetent person, and that by his incompetency there was a collision of trains, and Deverill was killed.

Plea.—Not guilty, by statute.

The trial took place at Toronto before *Draper, C.J.*

It appeared that the deceased was driver of a train going west, and arrived at Stratford Station on the 12th of October about 7 A.M. Ryan was switchman there, and it was his business to protect the yard by lowering or raising the semaphore. If raised a train was not to enter, if down all was right. A freight train was coming east, and the switchman should have raised the semaphore at the east end of the station-yard, so that the deceased's train should not have entered. His neglect to do this caused the accident. Deceased came on with his train, and there was a collision, and he was killed.

The first witness, Jones, also a switchman, said it was Ryan's duty to have the way cleared for trains, and to protect the yard. Ryan switched not for the main line, but for the Buffalo line. He said Ryan should have notified him to raise the east semaphore, or should have done it himself. By going to the lever he could have seen whether the semaphore was up or down. Witness said if he was in Ryan's place he would have gone to see if it was raised. Ryan should have told witness, as it was the latter's place to raise the east semaphore, and if he could not find witness he should have done it himself. He thought Ryan an intelligent man; from the time he knew him to be in the service he would think he had not sufficient time to learn his duties; thought three weeks or a month would have qualified him for his duties; in some yards it would require three or four months. Since the accident the defendants had appointed two switchmen and a signalman for every night. Ryan had charge of the signals on both lines at the station. A man could learn merely to raise the signal when the yard was full in a few minutes. It was neglect on his part, not incompetence, not to do it. He should have instructions from an operator, and ascertain the positions of trains coming in; he should get instructions as to trains coming and crossing; if the freight train was in the station he wanted no instructions. Had witness known the deceased's train was coming he would have put up the signal. A person could

learn in a fortnight or three weeks. Witness went into the business at once, with no one to teach him.

Punshon, the engine-driver of the freight train, swore that from Ryan's conduct that morning he thought he was not competent for his duty. He had seen him seven or eight days before that in the defendants' employ. He was a man of ordinary intelligence, and knew how to raise the semaphore; it was his duty to know that deceased's train was overdue.

Hopkins swore that Ryan had been employed about three weeks before this; he had no previous experience that witness knew of. He knew deceased's train was overdue, and might arrive any moment. He should have protected the yard or told Jones to do it. He was there a week before he was put in charge of the yard. A man would learn in one day to put up the signal, and he had been doing this for two weeks. He was an intelligent man. Witness did not know any occasion before when two trains were coming in at the same time.

This was the plaintiff's case. Leave was reserved to enter a nonsuit, on the objections that the action was for the death of a servant by the neglect of a fellow-servant, and the proof of Ryan's incompetency was on the plaintiff.

On the defence, the chief engineer of the Great Western Railway swore that with a man of ordinary intelligence the duties of signalman and switchman were so simple that they could be learned in a day, and he said he knew the Stratford Station. Another Great Western Railway officer said a man of ordinary intelligence could learn the duties in a week, if he could not in that time he would not learn them at all; having seen it done several times he ought to be able to do it; said he had taught switchmen, and after two or three days found them generally fit for duty.

Mr. Shanly stated that a man of the smallest capacity, from the class of labouring men, could learn the duties in two days. The station-master at Stratford said he had appointed Ryan, whom he took on trial. Ryan said he had been signalman on a drawbridge. He was able to explain the meaning of different signals. He was kept around for a

week to see the other men work; then for a week, at a very busy time, as assistant switchman; then a week as night switchman. He was intelligent, wrote a good hand, and was a steady young man. He was three weeks under pay when thus appointed. Knew him to do what was right under similar circumstances as these. Another witness proved that Ryan had been two years in his employ, was steady, and a little above an ordinary labourer.

The learned Chief Justice explained the law to the jury in a manner not complained of, pointing out especially that the alleged breach of duty was that defendants had employed an inexperienced and incompetent man, distinguishing this from a mere neglect of Ryan.

The jury found for the plaintiff; the widow \$1000, the eldest child \$800, the next \$900, and the youngest \$1000; in all \$3700.

In Easter term *M. C. Cameron, Q.C.*, obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved, or for a new trial on the law and evidence, and for excessive damages.

Robert A. Harrison showed cause, citing *Hunter v. Caldwell*, 10 Q. B. 81, 82; *Mellors v. Shaw*, 1 B. & S. 437; *Franklin v. South-Eastern R. W. Co.*, 3 H. & N. 211; *Dalton v. South-Eastern R. W. Co.*, 4 C. B. N. S. 296; *Duckworth v. Johnson*, 4 H. & N. 653; *Holmes v. Clarke*, 9 L. T. Rep. N. S. 181; *Murphy v. Carrall*, 3 H. & C. 462; *Steggles v. New River Company*, 13 W. R. 413; *Holmes v. Worthington*, 2 F. & F. 533; *Murphy v. Smith*, 19 C. B. N. S. 361; *Britton v. South Wales R. W. Co.*, 1 F. & F. 171.

M. C. Cameron, Q.C., contra, cited *Brown v. The Accrington Co-operative Cotton Spinning, etc., Co.*, 12 L. T. Rep. N. S. 94, S. C. 3 H. & C. 511; *Morgan v. Vale of Neath R. W. Co.*, L. R. 1 Q. B. 149; S. C. 13 L. T. Rep. N. S. 564; *Tunney v. The Midland R. W. Co.*, L. R. 1 C. P. 291; *Gallagher v. Piper*, 16 C. B. N. S. 669; *Murphy v. Pollock*, 15 Ir. C. L. Rep. 224.

HAGARTY, J.—On the whole evidence adduced, it seems

impossible not to consider that the verdict for the plaintiff was clearly wrong and against the evidence.

The defendants could not be liable unless there was reasonable proof that they had intrusted a duty to Ryan (the deceased's fellow-servant), knowing that he did not possess competent skill for the purpose (*Gallagher v. Piper*, 16 C. B. N. S. 694). The injury arose from Ryan not raising the semaphore at the east end of the yard or telling Jones to do so. Assuming Ryan to be reasonably fit for his employment, his clear neglect of duty gave no right of action to his fellow-labourer, the deceased. Such possible neglect is one of the risks which persons entering the service of a railway company must legally take on themselves.

The whole case turns on Ryan's reasonable fitness for the duties of his service to the knowledge of the defendants or their managing officers. Apart from the question of nonsuit, we think it would be found impossible to let this large sum be recovered from the defendants on such testimony without directing the case to be submitted to the consideration of another jury.

The plaintiff's evidence, even if *prima facie* sufficient to be submitted to a jury, is very weak; and is, we think, wholly outweighed by the testimony adduced for the defence. In *McMahon v. Lennard*, 6 H. L. Cas. 995, it is said, "Even upon the evidence for the plaintiff there was no sufficient case for the jury; and when the evidence for defendants is to be added, we think the judge ought to have told the jury that if they believed the witnesses they ought to find a verdict for the defendants."

But we have to consider the motion for a nonsuit, and are met at once by the difficulty which the cases present as to what shall be considered sufficient evidence for a jury.

It is not enough to say that there was some evidence. "A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury" (*Toomey v. London, Brighton, etc., R. W. Co.*, 3 C. B. N. S. 150). "There is another rule of the law of evidence,

which is of the first importance, and is fully established in all the courts, viz. that where the evidence is equally consistent with either view—with the existence or non-existence of negligence—it is not competent to the judge to leave the matter to the jury. The party who affirms negligence has altogether failed to establish it. That is a rule which should never be lost sight of" (per *Williams, J.*, in *Cotton v. Wood*, 8 C. B. N. S. 573).

This case is referred to by *Willes, J.*, in *Lovegrove v. London and Brighton R. W. Co.* (16 C. B. N. S. 691, 692). He adds: "It is not enough for the plaintiff to show that he has sustained an injury under circumstances which may tend to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendants; but he must go on and give evidence of some specified act of negligence on the part of the person against whom he seeks compensation. . . . Was there any evidence that the company did employ an incompetent person? The only evidence was one act of negligence committed by that person—he once omitted to use due and proper care in doing the work intrusted to him. If that (which I venture to doubt) is evidence of incompetency, it certainly was not evidence that the company knowingly employed an incompetent workman. Then is the burden of proof of the workman's competency cast upon the master? I apprehend not. There is nothing to differ this from ordinary cases."

In *Avery v. Bowden*, in Error (6 E. & B. 973), *Pollock, C.B.*, says: "When the question whether there is evidence to go to the jury is reserved by consent (and it cannot be reserved without consent), 'no evidence' means 'no reasonable evidence.' Where the evidence is such that the court, had there been no other evidence, and the jury had acted upon it, must have set the verdict aside, that, on such a reservation, is no evidence." This was where there was leave reserved to enter a verdict for the defendant if the court should think there was no evidence to go to the jury, the defendant offering none. The Chief Baron adds: "It would be absurd to send a case down to new trial where, if the jury should find in accordance with the evidence relied

on, it would be the duty of the court to set such verdict aside as against the weight of evidence."

Cresswell, J., cites *Lord Tenterden's* opinion: "If the evidence was such that the jury could only conjecture, but not judge, it ought not to go to the jury; that the onus was on the party offering the evidence; and that he, if he offered only evidence consistent with either supposition of fact, was not entitled to have it put to the jury."

This is again laid down as the rule in *M'Mahon v. Lennard* (6 H. L. Cas. 993).

In *Farrant v. Webb* (18 C. B. 801), *Jervis, C.J.*, says: "The judge should have left it to the jury to say whether or not the defendant used ordinary care in endeavouring to procure a competent person. That was not put; the defendant's liability was made to hinge on his competency. . . . The master is not responsible where he does his best to get competent persons. He is not bound to warrant their competency."

We must examine the case before us by the light of these authorities. Does the evidence present any reasonable proof that the defendants negligently employed an incompetent person?

It was proved by the plaintiff that Ryan had been about three weeks in the defendants' employ, and was, as all the witnesses say, an intelligent man; he had no previous experience that the witnesses knew of. Jones's evidence alone raises any question. He says that Ryan was an intelligent man, and from the time he knew him to be in the service he would think he had not sufficient time to learn his duties; thinks three weeks or a month would have qualified him. The witness himself went into the business at once, with no one to teach him; a man could learn merely to raise the signal when the yard was full in a few minutes. It was *neglect*, he adds, on Ryan's part, not *incompetence*, in not doing what he should have done. Another man said that he thought him incompetent from his conduct that morning; that Ryan knew how to raise the semaphore. Another said Ryan had been there a week before he was put in charge of the yard, and was an intelligent man, and that a man would

learn in one day to put up the signal, and Ryan had been doing this for two weeks.

This is the whole proof of incompetency. Except in the address of counsel we find nothing as to Ryan being overburdened with duty.

It is to be feared that the jury adopted the view that, because he decidedly neglected his duty on the occasion of this unhappy accident, this afforded proof of his original incompetency.

He was three weeks in the defendants' employ, one week about the yard before being put in charge. The chief witness, Jones, says a man could learn his work in a fortnight or three weeks, and Jones himself went at the work without any previous training.

We thus have an intelligent man, employed by the defendants at work which, it is said by one of the plaintiff's witnesses, could be learned in a day, by another in two or three weeks. After being a week about the yard, Ryan is for two weeks employed at this very work, does it regularly during that time at a station where a very large number of trains pass daily, and then on one occasion omits to do an act of the most obvious kind, the raising the signal to prevent a coming train from entering the yard. It is difficult to see how this evidence proves the declaration that the defendants negligently employed an incompetent person. Their liability depends on whether Ryan at the happening of the accident was incompetent—a man unfit to be reasonably intrusted with the performance of the particular duty which he neglected to perform. But for this particular act of neglect it is quite probable that Ryan would have been readily vouched for by those who knew him as a steady careful official. There is no evidence of any previous incompetence, blundering, or unsteadiness against him. It would be a dangerous doctrine to hold that the particular act of omission on his part to raise the semaphore could be sufficient evidence of unfitness or incompetency for the duty of raising it when necessary. It is not so strong as the case of a man who is seen doing an act in so unskilful a manner as in itself to show his unfitness for the duty.

The witness Jones seems to place it on the true footing, viz. that it was Ryan's *neglect*, not his *incompetency*. If the jury believed this from the plaintiff's chief witness, the defence was established. The witness, who says that from his conduct that morning he thought him incompetent, most likely suggested the view taken by the jury—because he neglected his duty he was incompetent to perform it; *post hoc, propter hoc*.

The whole burden of proving Ryan's incompetency and the defendants' neglect rested on the plaintiff. We are unable to see how the evidence adduced for that purpose will stand the test suggested by the authorities. A scintilla of evidence, or a mere surmise that there may have been negligence, will not do. Evidence equally consistent with the existence or non-existence of negligence will not do.

On the morning of the accident the defendants had a man of intelligence employed to do a particular work, which he had been regularly doing for at least two weeks, apparently without complaint. While the freight train was in the yard, and deceased's train expected, he should have raised the semaphore; he neglected so to do, and hence the accident.

It is not easy to see how we can hold this neglect on Ryan's part not to be one of those risks which the deceased, a servant in the same common employ, did not take upon himself when he entered the service. We think to hold otherwise is to abrogate the doctrine laid down in the numerous cases that follow *Priestley v. Fowler* (3 M. & W. 6). The wisdom of this rule is vindicated in the judgment of *Shaw, C.J.*, of Massachusetts, cited with much approbation in 3 Macq. H. L. Cas. 297, and given at p. 316: "Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and can leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually

secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other." To leave such a case to the jury is, as has been remarked by English judges, simply to direct a verdict for the plaintiff, where a railway company are defendants.*

Very great compassion may be felt by the court, as sincerely as by the jury, for the family of the sufferer by this collision. Whatever jurors may feel at liberty to do, we at least must not allow this feeling to sanction what we believe to be a violation of a well-settled legal principle. Railway companies have to answer to the public for all neglects of their servants or agents, but the law has long declared that each servant in entering the service assumes the risk of his fellow-servants' neglect.

We think the plaintiff has failed to make out a case sufficient to be submitted to a jury, and that the rule for nonsuit should be made absolute.

DRAPER, C.J.—If the plaintiff's case when concluded was not sufficiently supported by evidence to be left to the jury, it certainly derived no additional strength from the testimony of the defendants' witnesses, which, if true, completely put the plaintiff out of court. We are not comparing the evidence, or drawing conclusions of fact from it, but we are looking at all that was proved to see whether in point of law there was evidence on which the jury ought to have been required or permitted to decide that the plaintiff's case was sustained. I think there was not.

Rule absolute for nonsuit.†

* See, per *Williams, J.*, in *Toomey v. London, Brighton, etc., R. W. Co.*, 3 C. B. N. S. 150.

† Leave to appeal was granted.

CHICHESTER v. GORDON, LACOURSE, AND GALLON.

Examination of judgment debtors—C. S. U. C. ch. 24, sec. 41—Form of order to commit.

An order to commit under Consol. Stat. U. C. ch. 24, sec. 41, must be absolute, not conditional.

A County Court judge being dissatisfied with the answers of a judgment debtor on his examination, ordered that he should be committed for six months unless he should forthwith give a negotiable note for the debt, made by himself and indorsed by one C. *Held*, that the order was bad, as being conditional.

The deputy sheriff joined with the attorney for the defendant in a plea justifying under such order. *Held*, that the plea being bad as to the attorney, was bad as to both.

DECLARATION for assault and false imprisonment, “whereby the plaintiff suffered great pain of body and mind, and was exposed and injured in his credit and circumstances, and was prevented from carrying on his business, and was obliged to give to the defendants a promissory note for a large sum of money, and to procure his sister, Charlotte Chichester, to indorse the same, and incurred other expenses in obtaining his liberation from said custody and imprisonment.”

Plea, by the defendant Gordon, that before the said alleged trespasses, to wit, on the 18th of June 1861, he, the said Thomas Gordon, in the County Court of the united counties of Peterboro’ and Victoria, by the judgment of the said court, recovered against the said plaintiff, Arthur Chichester, the sum of £38, 2s. 11d., and that afterwards, on the 18th of June, an execution was issued against the goods and chattels of the said Arthur Chichester thereon; that afterwards, to wit, on the 24th of March 1863, an application was made on behalf of the said defendant, Thos. Gordon, to R. M. Boucher, Esq., judge of the County Court of the county of Peterboro’, being a judge having power to dispose of matters arising in the said court of the united counties of Peterboro’ and Victoria, for a summons calling upon the said A. C., his attorney or agent, to show cause why he, the said A. C., should not be examined before James Smith, Esq., judge of the county of Victoria, *vivâ voce*, upon oath, touching his estate and effects, and the manner and circumstances under which the said A. C. con-

tracted the debt which was the subject-matter of the action in which the said judgment was obtained against him, and as to the means and expectations he then had, and as to the property and means he at that time had of discharging the debt, and as to the disposal he may have made of any of his property. And afterwards, to wit, on the 31st of March 1863, the said R. M. Boucher, judge of the county of Peterboro', as aforesaid, made an order for the examination of the said A. C., pursuant to the terms of the said summons, no cause being shown against it. And the said A. C. was afterwards examined before James Smith, Esq., judge of the county of Victoria; and on the 15th of May 1863 the said R. M. Boucher, judge of the said county of Peterboro', as aforesaid, after calling upon the said A. C. by a summons, dated on the 6th of May 1863, and after hearing him by his attorney, did order that the defendant be committed to the common gaol of the county of Victoria for six calendar months, unless he then forthwith gave to the said Thomas Gordon a negotiable promissory note for the full amount of the debt, made by himself and indorsed by Charlotte Chichester, payable in six months from the 9th of May 1863, upon the grounds that the said A. C. did not at his examination referred to in the said summons make satisfactory answers touching his estate and effects; and under the said order the said A. C. was arrested—which are the alleged trespasses. And the defendant avers that the said order is still in full force and unrescinded.

Plea by defendant Anthony Lacourse in person, and James Gallon by Anthony Lacourse, his attorney, that defendant Gordon recovered judgment in the County Court of Peterboro' and Victoria (as in the first plea), and proceedings upon said judgment were pending at the time of the dissolution of the union of the said counties, and no change of venue was directed in the said action. And after the dissolution of the said union, the said Gordon applied to Robert Maul Boucher, Esq., judge of the County Court of the county of Peterboro', for an order that the said now plaintiff, who resided in the county of Victoria, should be orally examined upon oath before James Smith, Esq., judge of the County

Court of the county of Victoria, touching his estate and effects, etc. (setting out the terms of the order applied for). And the said first-mentioned judge made the said order, and said now plaintiff, upon notice of the said order, attended before the said James Smith, Esq., in pursuance thereof, and was then and there duly examined touching the matters in the said order mentioned, and his examination was duly reduced to writing by the said James Smith, Esq., and was returned to the said first-mentioned judge; and the said first-mentioned judge afterwards, on the 7th of May 1866, then, on the application of the said Gordon, and on reading the said examination, granted a summons calling on the said now plaintiff, his attorney, or agent, to attend before him on the second day after service thereof, to show cause why he should not be committed to the common gaol of the county of Victoria, or why a writ of *capias ad satisfaciendum* should not be issued against him, on the grounds that he did not at his said examination make satisfactory answers touching his estate and effects, and that it appeared by the said examination that he had made away with his property in order to defeat or defraud his creditors, and on the grounds that in contracting the said debt he was guilty of fraud in concealing the fact that he had executed a confession of judgment in favour of his sister, upon which execution had issued in another county than that in which the said debt was contracted without the knowledge of the said Gordon. And the said now plaintiff was on the said seventh day of May duly served with the said summons, and on the second day after service thereof he duly attended in pursuance thereof, by his attorney, before the said Robert Maul Boucher, judge as aforesaid, and the said Gordon also attended by his said attorney, and the said judge, upon hearing the said parties respectively by their said attorneys, was of opinion and decided that the said now plaintiff did not at his said examination make satisfactory answers touching his estate and effects, and decided to commit him for six calendar months to the common gaol of the county of Victoria, in which county the said now plaintiff then resided; and the said judge was about to make an order for such committal, when the said now

plaintiff proposed to give forthwith to the said Gordon, in satisfaction of the said judgment, a negotiable promissory note for the full amount of the debt and costs in the said suit, made by the said now plaintiff and indorsed by Charlotte Chichester, payable in six months from the ninth day of the said month of May, and requested that the said order for committal should be made for such committal in default of his forthwith giving the said note, and the said Gordon consented thereto. And the said Robert Maul Boucher, Esq., as such judge, then, upon such request and consent, made an order that the said now plaintiff be committed to the common gaol of the county of Victoria for six calendar months, unless he should forthwith give to the said Gordon a negotiable promissory note for the full amount of the debt and costs in the said suit, made by himself, the said now plaintiff, and indorsed by Charlotte Chichester, payable in six months from the ninth day of May then instant, upon the grounds that the said now plaintiff did not at his said examination make satisfactory answers touching his estate and effects. And a reasonable time elapsed for the said now plaintiff to give the said note, and he did not give the same; wherefore the defendant Anthony Lacourse, being attorney for the said Gordon, did as such attorney and on the behalf of the said Gordon deliver the said order to the sheriff of the county of Victoria to be executed, and the defendant James Gallon was deputy sheriff of the county of Victoria, and did as such deputy sheriff, in obedience to the said order, and in execution thereof, gently lay hands on the said now plaintiff, and took him into custody, and imprisoned him in the common gaol of the said county of Victoria—which are the alleged trespasses.

Demurrer to the plea of the defendant Gordon, on the following grounds: 1. The plea does not show that the now plaintiff, at the time of the order for his examination and commitment, resided within the county of Victoria.

2. The summons and order for the now plaintiff's oral examination, as granted, was not, nor was either of them, in the form or otherwise as prescribed by the statute in that behalf.

3. The order for the commitment of the now plaintiff was

void, as it was conditional, and embracing a condition which the judge of the County Court had no power to make.

4. That the said order was not more than order *nisi*; that is, that a commitment of the now plaintiff should be made unless he gave the note in said plea mentioned, and it does not appear that the said plaintiff did not give such a note as is mentioned in said order; and the now plaintiff could not be legally arrested under said order until it was first shown to the judge that he had not complied with the conditions thereof.

Demurrer to the plea of defendants Lacourse and Gallon on the same grounds, excepting the first.

K. McKenzie, Q.C., for the demurrer, cited *Ex parte Kinning*, 4 E. B. 507; *Abley v. Dale*, 10 C. B. 62; *Baird v. Story*, 23 U. C. R. 624.

Gwynne, Q.C., for defendant Gordon, and *C. S. Patterson*, for the other defendants, contra, cited *Andrews v. Marris*, 14 Q. B. 17; 1 Wms. Saund. 28; Ch. Plg. vol. i. p. 593.

HAGARTY, J., delivered the judgment of the court.

Our judgment turns on one of the objections, namely, that the order is conditional, and therefore the judge had no power to make it.

This objection seems to us to be fatal. The statute in certain cases allows the commitment of the judgment debtor, but we are unable to find any authority for ordering a commitment unless the debtor will perform some specified act. The judge is not empowered to force the debtor to find security for the debt or any part thereof. On a review of the debtor's answers as to his estate, etc., the judge may commit or allow the issuing of a *ca. sa.* The committal must, we think, be absolute, and not to depend on the doing or the omitting to do any specific act.

Mr. Gwynne argued that the committal was absolute, and the debtor would be at once liable to arrest thereon, but that it was defeasible on his giving the note indorsed as directed. We hardly see how this construction would much aid the plea. If arrested on this order, how was the debtor to avail himself of the privilege? The amount for which the note

was to be given is not specified, except by reference to the debt and costs in the suit; no provision made for his discharge if he gave the note, etc. etc. We do not, however, read the order in the sense suggested by counsel.

The case of *Abley v. Dale* (10 C. B. 62) seems much in favour of the objection; so also *Ex parte Kinning* (4 C. B. 507) and *Kinning v. Buchanan* (8 C. B. 271).

All these cases lead to the opinion that the order must be absolute; that if a debtor be ordered to pay at a future day or by instalments, he cannot be committed prospectively in default of his so paying; he must be again given the opportunity of being heard against the deprivation of his liberty. If this order had been for committal unless he gave the note within a certain number of days, it would be open to the same objections as a condition if he did not pay the debt within the same time. He may have a valid excuse for the omission, and is entitled to be heard. We cannot see how the order can be any better because it directs or provides for the note being given forthwith. We hold the pleas to be no defence.

The plea by Gallon, the deputy sheriff, is pleaded jointly with that of the defendant Lacourse. It differs materially from *Bullen v. Moodie et al.* (13 C. P. 126). There the sheriff justified separately, showing an order of commitment good on its face, and he was protected.

By the rules of pleading it seems that if the officer join with another defendant to whom his defence does not also apply, he loses his protection (1 Wms. Saund. 28, note 2). "If two or more join in a defence which is a sufficient justification for one, but not for the others, the plea is bad as to all; for the court cannot sever it." So in *Andrews v. Marris* (1 Q. B. 17), *Lord Denman*, in giving judgment, speaking of a case in Willes 122, says: "In that case the officers of the court chose to join in pleading with the party, and set out the whole proceedings: having done that, unnecessarily for them, they were of course bound by the defects apparent on their plea," etc. So in *Phillips v. Biron* (1 Strange, 509), *Smith v. Bouchier* (2 Strange, 993). See also *Chitty Pl.* 7th ed. vol. i. p. 593.

Judgment for plaintiff on demurrer.

IN THE MATTER OF THE AWARD BETWEEN JOHN CAMERON
AND THOMAS KERR.*Fence-viewers—Award.*

This court has no authority to set aside an award of fence-viewers made under Consol. Stat. U. C. ch. 57.

Robert A. Harrison applied for a rule, calling upon John Cameron to show cause why the award of John Menzies, John Ward, and Peter Fisher, fence-viewers in the township of Bathurst, in the matter of dispute between him and Thomas Kerr, should not be set aside with costs, because—

1. The fence-viewers had no power to make the award so as to bind Kerr, or his rights or interests.

2. The award does not direct Cameron to contribute to the expense of making the drains already upon the land of Kerr before giving to Cameron a right to use the same.

3. That the award permits Cameron to put a pipe into Kerr's land, which will have the effect of destroying the under draining of Kerr's land and render it unfit for cultivation.

4. That the fence-viewers had no right to permit Cameron to do what the award sanctions, and declare that he should not be considered a trespasser.

5. That Menzies, one of the fence-viewers, was, by reason of his interest in the subject-matter of the award, disqualified.

The award was produced under the hands of the three fence-viewers, dated 22nd May 1866. It recited that they had been called upon to examine and determine upon a certain ditch or watercourse running across the east half of No. 18 and west half of No. 19, in the sixth concession of Bathurst, owned respectively by John Cameron and Thomas Kerr, and that they had examined the ditch in the presence of the parties; and it awarded that Cameron should be allowed to put a three-inch pipe into the open drain sunk by Kerr, and that Cameron should be allowed to open the drain on Kerr's premises, without doing any unnecessary damage, and that he should not be deemed guilty

of trespass for so doing. It stated that the fence-viewers in making the award had had due regard to the interest each of the parties had in the opening of the drain, and further awarded that Kerr should pay three dollars "in costs of attendance."

An affidavit of Kerr's was filed to sustain the objections taken in the rule, and to show the unfairness of the award.

Cur. Ad. Vult.

DRAPER, C.J., delivered the judgment of the court.

Before we consider whether on the merits set out we should grant a rule we must decide whether we have any jurisdiction.

Under the Consol. Stat. U. C. ch. 57, sec. 8, three fence-viewers of any municipality, or a majority of them, may decide all disputes (among other things) respecting the opening, making, or paying for ditches and watercourses under the Act.

Sec. 11 gives them authority to divide or apportion the ditch or watercourse among the several parties, "having due regard to the interests of each in the opening thereof, and shall fully determine the matters in dispute;" and by

Sec. 9, "Every determination or award of fence-viewers shall be in writing, . . . and such determination or award shall be binding on the parties thereto."

Sec. 13 provides for a new award when by reason of a material change of circumstances in respect to the improvement and occupation of adjacent lots, an award previously made ceases, in the opinion of either of the parties, to be equitable between them.

Sec. 16 points out what proceedings shall be taken to ascertain the amount payable by any person who under the authority of the Act makes, opens, or keeps open any ditch or watercourse which another person should have done, and to enforce payment. It is to be done by three fence-viewers; and sub-sec. 9 says such determination shall be final, and it is to be reported to the justice who required the fence-viewers to settle such questions; and that justice (sub-sec. 10) is to return the determination so reported to him to the

clerk of the Division Court having jurisdiction over that part of the municipality ; and (sub-sec. 11) after forty days from the determination the clerk of the Division Court shall issue execution against the goods of the defendant, in the same manner as if the party in whose favour the determination was made had recovered judgment in the Division Court for the sum awarded by the fence-viewers, and costs.

The whole frame of this Act convinces us that the legislature intended to provide for the summary and final determination of the matters comprised within its scope, and erected a jurisdiction whose award and determination made within and pursuant to the provisions thereof was intended to be conclusive. We do not consider that the use of the term "award" introduces the law in respect to arbitrations as applicable to the proceedings of the fence-viewers. Their award is, as the Act generally expresses it, their determination on the subject-matter, and has its effect as a determination by the words of the Act, making it binding on the parties (sec. 9), or by being declared final (sec. 16, sub-sec. 9) ; and there is only one provision which interferes with the finality of any award or determination, which is to be found in sec. 13.

It is unnecessary to inquire how far the finality of the determination is subject to impeachment or denial, either in proceedings to enforce it, or where it is set up as a justification for Acts which otherwise would be an interference with the rights of another. This application is for the summary interference of the court. The Act itself gives us no jurisdiction. There is no submission which can be made a rule of court, nor any agreement out of court which would give us jurisdiction under the statute of William III., and the motion is made on the assumption that this court has, without any such previous proceeding, authority over the subject-matter. We are of opinion that we have no such authority, and that the rule should be refused.

Rule refused.

HAYBALL v. SHEPHARD.

Secondary evidence of will—Admissibility of memorials—Production of will—Practice.

In ejectment the plaintiff claimed under the heir of B., who died in 1826, leaving a will, which was shown to be in defendant's possession, who declined to produce it on notice. Two memorials were then offered as secondary evidence, but rejected, on the ground that they were not shown to have been registered by any one connected with the suit. It was afterwards proved that a partition deed had been executed in 1848 between the four sons of B., by which the land in question went to I., under whom defendant claimed; and the memorial of the will purported to be executed by S., another of the four sons, as a devisee.

Held, that the memorials *when tendered* were rightly rejected, for the reason given, though they would have been admissible after the subsequent evidence; but as they were not then again offered, and the plaintiff's case was not one to be favoured, the court refused to interfere.

Held, also, that defendant was not compellable to produce the will.

EJECTMENT for the south-east quarter of lot 18, in the 3rd concession of the township of York, east of Yonge Street. The writ was tested 8th December 1865.

The plaintiff claimed title by bargain and sale from Charles N. Brock and others, heirs and devisees of Thomas Brock, deceased. The defendant claimed title by length of possession, and under a deed from one Isaac Brock. The defence was for the whole land claimed.

The case was tried at Toronto, in April last, before *Draper, C.J.*

It was proved that in February 1826 Francis Brock died in possession of the whole lot number 18, having lived upon it from 1808. He was twice married. By his first wife he had five children, of whom Thomas was the eldest, and who settled in Philadelphia, and died about six years before the trial. If the land in question in this suit vested in him as eldest son and heir-at-law of his father, there was sufficient evidence to establish the right of the plaintiff derived from him.

By his second marriage Francis Brock had twelve children. The second wife died in 1836. It was proved that Francis Brock left a will, which was traced to the possession of the defendant. There were three subscribing witnesses to it, but they were all dead. William Duncan and John Lamoreau, both since dead, were the executors.

Joseph Austin Spencer, a son-in-law of the deceased

Thomas Brock, produced a paper, which he stated was found on a careful search among the papers of Thomas Brock in the possession of Charles, the son of Thomas. It purported to be a letter from the widow of Francis Brock, and was addressed to Thomas Brock. No other proof of it was offered; it was formally tendered in evidence for the plaintiff, and was rejected. It was stated to be more than thirty years old.

A clerk in the office of the registrar of the county of York produced two memorials from the files of that office. They both purported to be memorials of the will of Francis Brock. One was registered on the 22nd of May 1828, the other on the 27th of May 1848. Their admissibility as evidence was objected to, and they were rejected on the ground that they did not appear to have been signed or registered by or at the instance of any party connected with this suit, who would either be bound to admit or be prevented from denying their authenticity.

The defendant was called by the plaintiff, and admitted that he had in his possession a partition deed of the estate of Francis Brock, but he declined to produce it or the will of Francis Brock.

Henry Brock, a son of Francis by his second marriage, stated that he had signed a memorial of the partition deed, dated 4th March 1848; that it was a deed between four sons of Francis by his second wife, and was executed by Isaac Brock and his wife, the witness and his wife, Samuel Brock, and Elias Brock and his wife. These four were the youngest children of that second marriage. It was assumed that the wives only joined to bar dower. Elias, the eldest of these four, had, as was sworn, been in possession ever since his father's death. By this partition Isaac became entitled to the south-east quarter of the lot, and the defendant's father bought it from him. On this quarter there was only a shanty built; there were houses on the other part. It was sworn that Thomas Brock had been in Upper Canada once after the American War, a second time about seven or eight years after his father's death, and again about fourteen or fifteen years before the trial.

On the part of the defendant, it was objected that under the statutes of 1834 or 1862 (25 Vict. ch. 20) the plaintiff's claim was barred.

The jury were directed to find for the defendant, and leave was reserved to the plaintiff to move to enter a verdict for him on the evidence, the court to be at liberty to draw such inferences of fact as a jury might.

Robert A. Harrison obtained a rule *nisi* accordingly, on the ground that the plaintiff established his legal title to the premises, which the defendant did not displace; or for a new trial for rejection of evidence, in this, that the learned judge refused, as secondary evidence, to allow Francis Brock from recollection to speak of the contents of his father's will, and refused to receive the written declaration of the widow of the deceased, made shortly after his death, as to the contents of the will, and to receive the memorials; or for misdirection, in ruling that the defendant, who was sworn as a witness on the part of the plaintiff, was not bound to produce the will of Francis Brock, deceased.

M. C. Cameron, Q.C., and *M. Michael* showed cause, citing *Pickering v. Noyes*, 1 B. & C. 262; *Doe dem. Earl of Egremont v. Langdon*, 12 Q. B. 711; *Newton v. Chaplin*, 10 C. B. 356; *The Queen v. Inhabitants of Llanfaethly*, 2 E. & B. 940; *Doe Prince v. Girty*, 9 U. C. R. 41; *Smith v. Nevilles*, 18 U. C. R. 473; *Marvin v. Hales*, 6 C. P. 208; *Lynch v. O'Hara*, 6 C. P. 259; *Gamble v. M'Kay*, 7 C. P. 319; *Volant v. Soyer*, 13 C. B. 231; *Clay v. Shackera*, 2 Moo. & Rob. 247; *Doe Loscombe v. Clifford*, 2 C. & K. 452; *Clarke v. Little*, 5 U. C. Chy. Rep. 363.

Robert A. Harrison, contra, cited *Riccard v. Blanuri*, 4 E. & B. 329, 338; *Daniel v. Bond*, 9 C. B. N. S. 716, 723; *London Gas Light Co. v. Vestry of Chelsea*, 6 C. B. N. S. 411; *Davey v. Pemberton*, 11 C. B. N. S. 628; *Owen v. Nickson*, 3 L. T. Rep. N. S. 737; *Gough v. M'Bride*, 10 C. P. 166; *Ansley v. Breo*, 14 C. P. 371; *Attorney-General v. Corporation of London*, 12 Beav. 8, 12, 28; *Woolley v. Pole*, 14 C. B. N. S. 538; *Sadlier v. Biggs*, 4 H. L. Cas. 435, 437, 442, 456, 459, 460; *Scully*

v. Scully, 10 Ir. Equ. Rep. 1057; *Peyton v. M'Dermott*, 1 Drury and Walsh, 198.

DRAPER, C.J.—The plaintiff claimed title under the eldest son and heir-at-law of Francis Brock, who died in possession of the premises, and whose death, according to the statement of one of his sons (a man seventy-three years old), occurred in 1820 or 1821. This witness also proved that his father left a will. This will was proved to have been in the registry office of York and Peel, and to have been delivered thence to one William Duncan, who was an executor, and who, as the first witness swore, drew the will and read it, after the testator's death, to him. It was proved that the will was not in the Surrogate Office, nor had probate of it been granted.

A son of William Duncan was then called, in order to prove his father's death; and he proved, quite unexpected to the plaintiff's counsel, as I thought at the moment, that the will was in the possession of the defendant, who showed it, or what he said was it, to the witness the day before. He did not read it.

Service of notice to produce was admitted, but the defendant's counsel objected that secondary evidence of its contents could not be received until the execution of the will had been proved. I ruled that I would receive secondary evidence, subject to the objection. Then two memorials were produced from the registry office by a clerk therein—one memorial having been recorded on the 22nd of May 1828, the other on the 27th of May 1848. They were then offered by the plaintiff's counsel to be read in evidence as proof of the will.

It was at this stage of the cause and upon the foregoing state of facts that I rejected them, because there was nothing to show that they had been signed or registered by or at the instance of any person connected with this suit, or who would be bound to admit or be prevented from denying their authenticity.

I continue to think the rejection was proper. Whether the evidence subsequently given went far enough to make

these memorials evidence I am not now called upon to decide, because they were not again offered after that evidence had been given. I think it most probable that I should then have received them, though doubtingly; for even then I had not been able to gather from anything that had transpired why the plaintiff, who claimed under the heir-at-law of Francis Brock, wanted to prove the will. But the memorials were never tendered in evidence after the rejection above stated. It was not until the very close of the case that it was proved that Francis Brock did not die until February 1826.

Looking at the length of possession since that date up to the bringing of the action, the hardship on the defendant if he were ejected, his father being apparently a *bonâ fide* purchaser, and the legal doubt whether the statutes of 1834 or 1862, one or the other, would not bar the plaintiff's recovery, I do not think the plaintiff has any strong claim for indulgence. If there had been in the opinion of my learned brother any miscarriage at the trial, I would have at once concurred in granting a new trial; but as he thinks there was not, I am not disposed to give the plaintiff a second opportunity, after this long delay, of asserting his claim in this action.

HAGARTY, J.—The point taken in this rule, as to the refusal of the learned judge to compel the defendant to produce the will, may be at once disposed of. I do not see how a party to a suit can be compelled thus to produce such a paper. He might decline doing so as being part of his title. It is every day's practice for a plaintiff or defendant on being called on to produce merely to refuse, the result of course being, if the document be traced or admitted to be in his possession, at once to let in secondary evidence. At the time the refusal to produce took place the plaintiff had not shown any interest in or right to the will. On the contrary, he was claiming through the heir-at-law, as in the case of an intestacy. The utmost the court could have done would be to commit the witness for refusing to produce; but this would not help or advance the plaintiff's case. I also think

the letter of Judy Brock, as a statement of the contents of the will, rightly rejected. I do not see any authority for its admission.

When the memorial of the will was produced, I think the learned judge, as the case then stood before him, rightly rejected it, for the reason stated in the objection.

At a later stage of the case the plaintiff proved by Henry Brock that a partition deed was made in 1848 between the four sons of the original owner Francis Brock, viz. Isaac Brock, the witness Henry Brock, Samuel Brock, and Elias Brock. This Elias had been in possession ever since his father's death. By this partition Isaac became entitled to the land in question in this cause, and defendant's father had bought it from him.

On referring to the rejected memorial we find it to be under the hand and seal of Samuel Brock, professing therein to be a devisee in the will mentioned.

If the plaintiff had tendered the memorial after this evidence, I think it might have been received on being proved to be executed by the Samuel Brock, one of the parties to the partition deed. Defendant claims under Isaac Brock, who having an undivided interest in the land, became solely seised by the transfers of the similar estates of Samuel, Elias, and the witness Henry.

In *Doe Loscombe v. Clifford* (2 C. & K. 452), before *Alderson, B.*, in order to prove title in W. Loscombe a memorial of the deed to him was offered. The judge said: "The memorial is only evidence against the persons who register the deed and persons claiming under them. If you can show that this defendant claims under this W. Loscombe, I will receive the evidence. . . . It is only evidence against the persons registering and those who claim under them."

The defendant appears to claim under this Samuel Brock, and I think a memorial professing to exhibit his title should be received as secondary evidence.

Supposing, however, the will to be in evidence, I hardly see how the plaintiff can expect to succeed in this suit, even if the will passed only life estates to the sons. One

of them at least was living at the time of the trial; and without expressing any opinion as to the sufficiency of the will to pass any greater interest than a life estate, its production cannot aid the plaintiff.

Rule discharged.

CHARLES BLACKBURNE JONES AND LÆTITIA ANN JONES
v. M'MULLEN.

Deed thirty years old—Power of attorney—Proof of.

The production of a deed thirty years old, purporting to be executed under a power of attorney, does not prove the power.

In this case the only proof of authority was the production of a paper professing to be a copy of an unsealed power of attorney, dated in 1824, and received by the plaintiffs' attorney from the son of the person appointed by it, since dead.—*Held*, clearly insufficient.

EJECTMENT for the east half of lot 39, in the 2nd concession of the township of Osgoode. Writ issued 7th December 1864.

The defendant appeared for the whole.

The plaintiffs claimed title under a deed from William A. Anderson and by devise from the late Lieut. Charles Jones, and Charles Blackburne Jones also claimed as heir-at-law of the said Lieut. Charles Jones. The defendant claimed title by twenty years' adverse possession.

The trial took place at Ottawa, in April 1866, before *John Wilson, J.* The plaintiffs put in letters patent, dated 3rd April 1829, granting the premises in question to Thomas Williams in fee.

The plaintiffs' attorney then proved service of the papers following:—

1. A notice under Consol. Stat. U. C. ch. 27, sec. 17, calling on the defendant to show upon the trial what legal right he had to the possession of the premises; and, 2. A notice that the plaintiffs at the trial would give in evidence, as proof of the devise contained in the will of Lieutenant Charles Jones (B), Royal Navy, a copy of the probate of the said will, stamped with the seal of the Surrogate Court granting the same.

He also proved that he made inquiries of the widow of Stephen Yarwood, late a purser in the Royal Navy, and

learned that her son had his father's papers, and from him he got a paper which he produced, dated 25th September 1824, which purported to be a copy of a power of attorney, signed by Thomas Williams, but not sealed; but he offered no proof of it, except so far as it would prove itself. Defendant's counsel objected to its being received.

He then put in a deed, dated 24th August 1829, purporting to be made between Thomas Williams, by Stephen Yarwood his attorney (and executed by Stephen Yarwood as attorney for Thomas Williams), and Charles Jones, a lieutenant in the Royal Navy, and conveying to the said Charles Jones, among other lands, the lot for which this ejectment is brought, which deed was registered on the 20th of March 1830. This was also objected to.

Next was put in a copy of a probate of the will of Charles Jones (B), Royal Navy, the proof of which was a paper writing or certificate thereto annexed, as follows:—

“In the Surrogate Court.

“*Niagara District,* } Know ye that on the nineteenth day
Canada West. } of February, in the year of our Lord
 one thousand eight hundred and thirty-nine, probate of the
 last will and testament, with codicil thereto annexed, of
 Charles Jones B., lieutenant Royal Navy, was granted to
 the Reverend John Anderson, a true copy of which *said is**
 hereunto annexed. In witness whereof we have hereunto
 affixed the seal of the said Surrogate Court this ninth day
 of November, in the year of our Lord one thousand eight
 hundred and forty-nine.”

To this it was objected that the alleged copy was not stamped with the seal of the Surrogate Court, but that such seal was placed on the above certificate, written on a separate piece of paper, and wafered on to the alleged copy: *non constat* that the certificate alluded to the instrument to which it was now attached. It was received, subject to these objections.

By the will the testator, among other things, left to his children (the two plaintiffs, and another daughter, Elizabeth Mary) “all property of which I am possessed at this time, or which may devolve upon me hereafter, to be held in trust

* *Sic.*

for them by my trustees, for their maintenance and education. And I direct that my trustees may dispose of such property for the use of my children as above mentioned, that is to say, the money procured by the sale of such property is to be applied to the use and benefit of my children as above named, and to that purpose only; but my wife Jane is nevertheless to enjoy a life-interest in the house and farm in which I now live, situate on the Niagara river, in the township of Bertie, near the village of Waterloo. . . . I appoint my wife Jane and the Reverend John Anderson to be my trustees and executors, for the purposes above mentioned." Dated 15th December 1838. The codicil contained nothing of any importance to the present case.

Evidence was given of the death of the testator on the 27th of January 1839, and of the death of his widow, and of his daughter Eliza, unmarried, in 1864. It was proved that the deed from Thomas Williams, the grantee of the crown, to Lieutenant Charles Jones, and the patent from the crown, which were produced, were found among the papers of a brother of Lieutenant Charles Jones by his son after the father's death in 1861. No power of attorney was found.

Letters were put in from the former treasurer of the county of Carleton, showing that the taxes on this land had been paid by the family of Lieut. Charles Jones, and a deed dated 14th November 1864, executed by William A. Anderson, heir-at-law of the surviving trustee named in the will of Lieut. Charles Jones, was put in and proved, by which he conveyed the land in question to the plaintiffs in fee.

This was the plaintiffs' case, and a number of objections to its sufficiency were raised on a motion for nonsuit.

The learned judge directed the jury to find for the plaintiffs, reserving leave to defendant to move to enter a nonsuit, if the plaintiffs had failed to make out a title.

In Easter term *C. S. Patterson* obtained a rule, calling upon the plaintiffs to show cause why a nonsuit should not be entered pursuant to leave reserved, on the ground that the plaintiffs failed in proving their title.

In this term *M^r Michael, Kingstone* with him, showed cause,

citing *Doe Maclem v. Turnbull*, 5 U. C. R. 129; *M'Queen v. M'Queen*, 10 U. C. R. 193; *Armstrong v. Little*, 20 U. C. R. 425; *Rex v. Inhabitants of Ryton*, 5 T. R. 259; *Rex v. Inhabitants of Netherthong*, 2 M. & S. 337; *Doe dem. Earl of Egremont v. Pulman*, 3 Q. B. 622, 626; *Fraser v. Fraser*, 14 C. P. 71; *Cook v. Christie*, 12 C. P. 517.

C. S. Patterson, contra, cited *Hibblewhite v. M'Morine*, 6 M. & W. 200; *Wynne v. Tyrwhitt*, 4 B. & Al. 377; *Story on Agency*, sec. 49.

DRAPER, C.J., delivered the judgment of the court.

We think there is a fatal defect in the plaintiffs' case, namely, the want of proof of authority in Stephen Yarwood to execute the deed of the 24th of August 1829. The only attempt at such proof was the production of the paper, which only professed to be a copy of an unsealed letter of attorney, dated 25th September 1824, which paper was delivered to the plaintiffs' attorney by the son of Stephen Yarwood, who as attorney for Thomas Williams executed the deed above mentioned. The attorney was informed that this paper was found among the papers of the late Stephen Yarwood, and not another tittle of evidence is given respecting it.

We do not think this deed, though thirty years old, is to be taken as proving more than that it was executed as on the face of it appears, namely, by Stephen Yarwood, asserting himself to be attorney for Thomas Williams. It does not prove he was attorney, more than if one a subscribing witness should swear he saw him execute it professedly in that character.

If this be so, we feel clear that the paper put in is no evidence, as it comes before us, of Stephen Yarwood's authority.

We have looked at the cases cited by *Mr. M'Michael*, but we find nothing in any of them to lead us to a different conclusion.

We think, therefore, the rule must be made absolute to enter a nonsuit.

Rule absolute.

CLISSOLD *v.* MACHELL.*Appeal—Delay.*

Where a defendant having obtained leave to appeal and procured the allowance of his bond delayed to proceed for an unreasonable time, the court ordered the leave to be rescinded, unless he should within a month settle a case to be entered in appeal.

K. M'Kenzie, Q.C., obtained a rule last term, calling on the defendant to show cause why the order of *Morrison, J.*, made on the 21st of February last, which stayed proceedings on the execution in this cause (the bond of security for appeal having been allowed), should not be rescinded, on several grounds; or why the defendant should not within a time to be fixed by the court state a case for the Court of Appeal with the plaintiff, or in the event of a difference between them to be settled by the court or a judge thereof; or why the leave to appeal should not be rescinded if the defendant neglect or refuse so to do, on the ground that the defendant uses such leave for the purpose of delay; and why the defendant should not pay the costs of this application.

In this term *M. C. Cameron, Q.C.*, showed cause, citing *Rowe v. Jarvis*, 14 C. P. 244.

M'Kenzie, Q.C., contra, cited *Torrance v. M'Pherson*, 11 U. C. R. 200; *Grant v. Great Western R. W. Co.*, 8 C. P. 350.

DRAPER, C.J., delivered the judgment of the court.

I regret greatly that circumstances beyond my control have left the Court of Appeal, since the passing of the Act 20 Vict. hitherto, without a new body of rules adapted to that statute. I know that a draft of such rules was prepared and submitted to the late *Sir John Robinson*, and received his consideration, but it has not yet been found practicable to get them finally settled. Those passed on the 3rd of July 1850 are not suited to the provisions of the present law, and the application in this case has not improbably arisen from the want of more fitting regulations.

We do not think we can properly grant the first branch of this rule. There are difficulties in the way, arising under the

17th section of the Act; and in our opinion it will be at all events a more proper course to give the defendant an opportunity of trying his appeal, if he seriously intends to do so. Leave to appeal against the decision of this court discharging the rule *nisi* for a new trial was granted on the 18th of December 1865, and except perfecting the security it seems nothing has been done, though on the part of the plaintiff urgent efforts to get the defendant to proceed have been made, and the opposition to this rule savours more of a desire to create delay than anything else.

Under the circumstances we think the plaintiff has a right to call on this court for its aid to compel the defendant to carry his proceedings into the Court of Appeal; and, as a measure which will tend in that direction, and which, as far as we see, can do no injustice to him, we make the latter part of the rule absolute to this extent, that unless the defendant do within one calendar month from the service of this rule settle a case jointly with the plaintiff, or if they cannot agree procure so far as rests with him such a case to be settled by the court or a judge, in order to be entered and heard in the Court of Appeal, that the order giving leave to appeal be rescinded.

We do not think we can properly give the plaintiff the costs of the application.

Rule accordingly.

FERGUSON v. CORPORATION OF THE TOWNSHIP OF HOWICK.

Action for not repairing highway—Venue—Practice.

An action against a municipal corporation for not keeping a road in repair is local.

Where such an action had been brought in the County Court of a county different from that in which the road was situate, and a verdict for the plaintiff confirmed in term, this court allowed the appeal from such judgment, but made no order, as the court below, having no jurisdiction, could not be ordered to do anything in the case.

Where the objection to venue appears on the face of the declaration, the defendant should demur; he cannot insist on a nonsuit, nor after verdict can he arrest the judgment, the objection then being cured by the statute. If the declaration does not state the situation of the premises, it will be assumed to be of the venue in the margin, but no objection will lie unless the question of locality is brought up by the plea, so as to create a variance.

APPEAL from the County Court of the County of Wellington.

Declaration for an injury to the plaintiff's horse by falling through a bridge on a road, being the concession line between the 10th and 11th concessions of the township of Howick, which it was alleged to be the defendants' duty to keep in a safe and proper state to be travelled, but which the defendants knowingly allowed to become full of holes, and dangerous, etc.

Defendants pleaded not guilty by statute, Consol. Stat. U. C. ch. 54, secs. 336, 337, and ch. 126, secs. 1, 10, 16, and 20.

The venue in the margin was "County of Wellington, To-Wit."

At the close of the plaintiff's case, it was objected by the defendants' counsel that the action could not be tried in that county; that it was a local action, to be tried only in the County of Huron, in which the township of Howick lay. The objection was overruled, and the plaintiff had a verdict.

Next term a rule to set aside the verdict, to arrest judgment, and to stay proceedings, on this and other grounds, was after argument discharged; and the defendants appealed to this court.

M. Michael for the appeal cited *Richardson v. Locklin*, 34 L. J. Q. B. 225; Consol. Stat. U. C. ch. 15, sec. 68.

S. Richards, Q.C., contra, cited *March v. Port Dover and Otterville Road Co.*, 16 U. C. R. 138; *Harrison v. Brega*, 20 U. C. R. 324; *Lush Prac.* 406; Consol. Stat. U. C. ch. 15; secs. 17, 18; ch. 22, secs. 1, 7; *Moran v. Palmer*, 13 C. P. 450; *Clayton v. Best*, 8 L. T. Rep. N. S. 502; *Hitchings v. Hollingsworth*, 7 Moo. P. C. C. 228; *B. & L. Prec.* 2; *Simmons v. Lillystone*, 8 Ex. 431; *Boyes v. Hewetson*, 2 Bing. N. C. 575.

HAGARTY, J., delivered the judgment of the court.

Two questions arise: 1st, Is it a local action? and if so, 2ndly, Can the objection be taken on this record and as it has been raised.

As to the first, the obligation to repair highways is cast on the defendants by the Municipal Act, secs. 336, 337, they

being the corporation of the township. The statutes give no express direction as to the venue of actions of this kind, and the Act in the margin of the plea, ch. 126 (Protection of Justices Act), has been held by the Court of Appeal not to apply to these corporations.* In any event, sec. 11, which regulates the venue in actions against magistrates, and allows special defence under the general issue, is not relied on or cited in the margin of the plea.

We have arrived at the conclusion that the action is local in its character.

The action is based upon the defendants' non-observance of their statutable duty in respect of a road within their jurisdiction. If they or an individual had placed any obstruction on the road, whereby the plaintiff had been injured, the action would be local, according to a late case of *Richardson v. Locklin* (11 Jur. N. S. 951; 34 L. J. Q. B. 225; 12 L. T. Rep. N. S. 728). *Blackburn, J.*, says, "This is an action for a nuisance caused on real property; such an action is clearly local." Again, "The declaration is substantially for obstructing a public way, which is clearly a local action."

We are unable to see the distinction between an injury resulting from putting an obstruction on a road and for omitting to keep the road in repair, so far as the local character of the action is concerned. They both result from something connected with the state of the realty, either doing or omitting to do something to or on the realty. Even in covenant for not repairing, a covenant running with the land, the action is local. See *Bailiffs of Litchfield v. Slater* (Willes, 433). By the court: "We think that actions of covenant for non-payment of rent, or not repairing, are local actions. Whether they are local actions or not when brought by the covenantee himself against the covenantor himself, yet there can be no doubt in the present case, the action being brought against an assignee, not as he is in privity of contract, but only as he is in privity of estate."

The subject is treated, and this latter distinction pointed

* See *Hodgins v. The Corporation of the United Counties of Huron and Bruce*, 3 App. Rep. 169.

out, in 1 Wm.'s Saund. 241 *e*, note 6, where the authorities are reviewed: "The action being founded, not upon any privity of *contract*, but upon privity of estate only, is local."

In *Boyes v. Hewetson* (2 Bing. N. C. 578) action of covenant for not repairing is spoken of in the judgment as a local action.

Com. Dig. "Action," N. 4: "Debt for rent, when it is not founded upon the contract, shall be brought where the land lies."—N. 5: "So every action founded upon a local thing shall be brought in the county where the cause of action arises; for there it can be best tried."

So in a late case of *Clayton v. Best*, 8 L. T. Rep. N. S. Q. B. 502, breach of covenant by non-payment of rent, by lessor against assignee of lessee, was held to be a local action.

Lush's Practice, vol. i. p. 405, 406, 3rd ed., speaking of local actions, says, "The gravamen is an injury to a local object, or to the person in respect of it." An instance is thus given: "If a man doth not repair a wall in Essex which he ought to repair, whereby my land in Middlesex is drowned, may bring my action in Essex, for there is the default, or I may bring it in Middlesex, for there I have the damage" (Bulwer's case, 7 Co. 1, *a*. See also Chitty Pl. vol. i. p. 281, 7th ed.).

Assuming that this action is local, it remains to be seen how the objection can be available.

It seems clear that this declaration would be open to demurrer on this ground, as the objection appears by describing the road and bridge as in the township of Howick, which we must judicially know to be in the county of Huron (that is, apart from any objection that if beyond the County Court's jurisdiction no judgment could perhaps be given). This was decided in *Dance v. Burrows* (10 C. P. 172).

Lush's Pr. 408: "It is important, however, to observe that the objection of a wrong venue must appear on the record. It is no ground of nonsuit at the trial except so far as the doctrine of variance may apply, where there is a local

description; and even where a local description ought to be given but is not, the venue will not be imported into the body of the declaration, and the plaintiff may recover on proof of a cause of action elsewhere; and after verdict, or judgment by confession, *nil dicit*, or *non sum informatus*, it is aided by statute. The only mode therefore of making it available where there is a local description in the declaration at variance as to the county, from the venue in the margin, is by demurrer; in other cases it must be raised by plea."

The latest case, in 1865, on the subject seems to be *Richardson v. Locklin*, already referred to (34 L. J. Q. B. 225). The declaration, with a venue in Surrey, was for wrongfully altering, etc., a public footway, obstructing it by a tree, etc. etc., with no local description. *Pleas*—1. Not guilty. 2. That the plaintiff was not lawfully passing. 3. Licence. Plaintiff was nonsuited by *Bramwell, B.*, on the opening of counsel, it appearing that the footway was in Essex and the action local. On argument in term it was urged that by the rules of pleading the county in the margin shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, etc. Provided that in cases where local description is now required, such local description shall be given.* As the reporter notes, the court gave judgment assuming that there was a plea traversing that there was such a footway. *Blackburn, J.*, "What is said in *Roscoe on Evidence*, p. 487, 10th ed., is quite true. If the action is local, and it appears in evidence that the premises are not situate within the county, that that is not a ground of nonsuit or objection at *Nisi Prius* unless the plea raises the point of venue, or the effect is to produce a variance. . . . In *Bullen & Leake's Pleadings*, page 2, 2nd ed., cases are cited in support of the proposition that when the place of the happening of a fact is a material allegation, the venue stated in the margin supplies that allegation in the absence of any other statement, and those cases fairly bear out that proposition. We must therefore

* See our rule No. 4, of T. T. 20 Viet. Har. C. L. P. A. p. 672.

take it that in the present declaration there is what amounts to an allegation that the footway was in Surrey, and that, being a material averment, a variance is raised by the plea between the allegation and the proof."

In *Boyes v. Hewetson* (2 Bing. N. C. 577) the action was local, on a covenant respecting land, venue Middlesex, locality not specified in the declaration, and no plea raised as to its locality. At the trial it appeared the land was in Surrey, and objection was made and nonsuit asked. A verdict for plaintiff was taken by consent, subject to a case, reserving the objection. *Tindal, C.J.*, refers to the statute 16 & 17 Car. II. ch. 8 (which enacts that after verdict judgment thereupon shall not be stayed or reversed, for that there is no right venue, so as the cause were tried by a jury of the proper county or place where the action is laid), and says: "After this statute, if the objection had appeared on the record the defendant could not have availed himself of it in arrest of judgment. He urges, however, that he took the objection before verdict, and had a right to prevent the trial from going on. But what issue was there that the defendant could have raised on this record to secure a verdict for himself? And he could not compel the plaintiff to submit to a nonsuit. On the other hand, the plaintiff had a motive for going on to a verdict, which he knew would aid any defect as to venue. There being no issue on this record that involved the question of locality, and nothing to prevent the plaintiff from proceeding to a verdict—such as non-compliance with the provisions of a particular Act of Parliament, or the like—there was nothing which necessarily led to a nonsuit; and therefore this rule must be discharged."

This case is cited and approved of in the judgment in *Hitchins v. Hollingsworth* (7 Moo. P. C. C. 236, 1850-52).

In *Clayton v. Best*, already cited, in a local action, when it appeared on the face of the declaration that the venue was laid in a different county from that where the premises were situated, the plaintiffs demurred, and it was allowed.

In the case before us the objection appears on the declaration. If the suit were in a superior court, we are of opinion

that if defendant had omitted to demur he could not insist on a nonsuit, and after verdict he could not arrest judgment, the objection being cured by the statute. If the declaration did not disclose the situation of the premises, they would be assumed to be of the venue stated in the margin; and if no plea were pleaded which would bring up the locality, so that a variance would arise between allegation and proof (as in *Richardson v. Locklin*), then defendant would fail.

It appears to us that on the face of the record before us the County Court of Wellington had no jurisdiction to try this, being a local action. The only technical difficulty is how to apply the remedy.

Prohibition would lie, I presume, or the learned judge below, on learning the views of this court, would doubtless abstain from further action.

In *Powley v. Whitehead* (16 U. C. R. 591) this court on appeal set aside a nonsuit which the judge below had ordered to be entered because he found he had no jurisdiction, the court holding that as soon as that fact was ascertained there was an end of the case, and the nonsuit and all done afterwards was *coram non judice*.

Our statute, Consol. Stat. U. C. ch. 15, sec. 68, says that we are to "give such order or direction to the court below touching the judgment to be given in the matter as the law requires." We cannot order the court below to do anything. We must assume that no further proceedings will be taken. If they are, they will furnish the ground of further application.

Appeal allowed.

SMITH ET AL. v. HALL.

Title—Bracery—32 Hen. VIII. ch. 9.

In ejectment it was objected that certain deeds under which the plaintiff claimed, executed in 1835, 1841, and 1844, were void because strangers then held possession claiming the fee. It appeared that one J. in 1842 "bought the possession" from one H., and was succeeded by his son and by the defendant, who had cleared about eighteen acres; and that in 1845 he had negotiated for the purchase of the fee. *Held*, not sufficient to avoid the deeds under the statute of Bracery, then in force, 32 Hen. VIII. ch. 9, for the evidence showed rather that the parties in possession did not claim the fee.

Semble, that the objection at all events could have applied only to the eighteen acres cleared.

EJECTMENT, summons tested 10th June 1865, claiming title to the west half of number 29, in the first concession of Hungerford. Defendant appeared on the 1st of August and defended for the whole.

The trial took place at Belleville, in March 1866, before *Hagarty, J.*

The plaintiffs proved their title thus:—

1. 2nd March 1810: letters patent granting the premises to P. Valteau. 2. 25th January 1823: conveyance of same premises, Valteau to John Benson. 3. 4th December 1835: conveyance of the premises, Benson to George H. Detlor. 4. 29th October 1841: conveyance of the premises, Detlor to William Smith and James Dick. 5. 9th January 1844: conveyance of the premises, Dick to William Smith. 6. 30th September 1848: will of William Smith, devising premises to the plaintiffs.

It appeared that the testator, William Smith, lived in Lower Canada.

On the defence, James Jermyn swore that in 1842 he bought the possession of the west half of this lot from one Solomon Hicks, and entered and remained three or four years, and his son James then entered under him; the defendant, Jermyn's son-in-law, succeeded, getting possession from the witness' son; Hicks had taken two crops off it; there were fences dividing lots 28 and 29, and the west and east halves of No. 29. He, his son, and the defendant cultivated it; there were about ten acres cleared and fenced when he first knew it, all the rest was wild; in the summer of 1845 about eighteen or twenty acres were cleared and

fenced; they thought nothing about the unfenced part, it was wild; about 1844 or 1845 he went to Mr. Ross to buy the land, not knowing who owned it; he understood Mr. Ross was agent; he bought from him verbally.

For the defence, it was objected that the deed from Detlor to Smith and Dick, and that from Benson to Detlor, also the deed from Dick to Smith, were void under the Statutes of Bracery which were then in force. The learned judge ruled against the objection, observing that the utmost for which possession was shown was eighteen or twenty acres, and there was no evidence that the true owner of the fee had notice that either Jermyn or any of the persons mentioned by him had entered into possession.

The jury found for the plaintiffs.

In Easter term *Harrison* obtained a rule, calling on the plaintiffs to show cause why there should not be a new trial, on the ground of misdirection, in ruling that although when the deeds from Benson to Detlor, Detlor to Smith and Dick, and Dick to Smith, were or some of them were made, the respective grantors were out of possession of the land purported to be conveyed, and other persons shown to be in possession claiming the fee, yet an estate passed by the deeds, and each of them sufficient to entitle the plaintiffs to maintain the action; or on the ground that the verdict is against law and evidence, in this, that one or more of the deeds under which the plaintiffs claim was or were executed by grantors out of possession at a time when third parties were in possession claiming the fee, and so no estate passed by such deeds.

Jellett showed cause in this term.

Bishop of Toronto *v.* Cantwell, 12 C. P. 607; Doe dem. Dunn *v.* M'Lean, 1 U. C. R. 151; Doe dem. Dixon *v.* Grant, 3 O. S. 511; Baldwin *v.* Henderson, 2 U. C. R. 388; Doe dem. Moffatt *v.* Scratch, 5 U. C. R. 351; Doe dem. Bouter *v.* Savage, 5 U. C. R. 223; Doe Clark *v.* M'Innis, 6 U. C. R. 28; Doe M'Millan *v.* Brock, 2 U. C. R. 270; Doe Beckett *v.* Nightingale, 5 U. C. R. 518, were cited on the argument.

DRAPER, C.J., delivered the judgment of the court.

The rule assumes a fact very material to sustain the conclusion contended for—namely, that when the deeds the operation of which is denied were executed, other persons than the respective grantors were in possession claiming the fee. The authorities cited by *Mr. Harrison* show that while the statute 32 Hen. VIII. ch. 9, was in force in Upper Canada, a conveyance made under such circumstances would be void.

But the evidence does not, in our judgment, warrant this assumption. The testimony of Jermyn contains the whole substance. He bought the possession of one Solomon Hicks in 1842; Hicks had taken two crops off it, and had a clearing when he sold of about ten acres. The very expression “buying possession” conveys the idea that the vendor was not claiming to be owner of nor the vendee to buy the fee; and as to the latter, three years afterwards he negotiated for the purpose of buying the land, evidently showing he did not claim more than possession at that time. We do not question that possession of land as apparent owner, nothing appearing to qualify it, is *prima facie* evidence of ownership in fee-simple; but here there is something to couple with the fact of possession, and to show that the possessor was not claiming ownership. The defendant derives his possession under Jermyn's son, to whom the father had transferred it.

We think, therefore, the case is not brought by the evidence within the Statute of Bracery, and it is not pretended that a defence was proved under the Statute of Limitations.

It might be added that the possession, according to Jermyn's statement, was not extended beyond the fenced and cleared land: in his own language, they “thought nothing of the unfenced part; it was wild.” It would be unjust to treat the true owner as disseised of the whole lot upon such evidence. The plaintiff, therefore, in any event has a right to retain the verdict for part, if not the whole; but in our opinion the rule should be discharged generally.

Rule discharged.

HOUGHTON v. THOMPSON.

Ejectment—Disclaimer—Tenancy.

Where the plaintiff in ejectment claimed as grantee of B., and defendant, besides denying the plaintiff's title, claimed under a demise from B.—*Held*, that defendant by refusing to admit B.'s title at the trial must be taken to have disclaimed, and was precluded from setting up the tenancy. The defendant asserted that he was a yearly tenant, and so entitled to notice; the plaintiff, that he was tenant only from one year's end to the other—

Held, that on the facts stated below the receipts for rent afforded no inference as to the nature of the tenancy.

EJECTMENT for the east half of lot 6 in the first concession of Metcalfe, formerly sixth concession south of the Egremont Road, Adelaide west; writ issued 5th January 1866.

The plaintiff claimed title as grantee of Henry C. R. Becher, who claimed through various mesne assignments from the grantee of the Crown. The defence was general, under a demise from Henry C. R. Becher.

The case was tried at London in April 1866, before *Morrison, J.*

The plaintiff produced letters patent granting the east half of lot 6 in the sixth concession south of the Egremont Road, in the township of Adelaide, to Lawrence Laurason. It was admitted that this grant covered the lot mentioned in the writ of summons. The plaintiff then put in and proved several deeds by which the title became vested in him. He also put in a letter written to him by the defendant's authority and in his name, dated 25th August 1865, as follows: "Sir,—I send this to desire you to let me know at your very earliest convenience if you intend renting your farm, E. $\frac{1}{2}$ 6, first con. Metcalfe, for another year, as I would like to commence preparing for winter wheat if I get the farm. I shall be in London shortly with wheat to sell to pay the rent." After this, as one of the plaintiff's witnesses proved, the defendant came into Mr. Becher's office for a lease for another year, and Mr. Becher said to him he could not get it. This was some time before the end of the current year. At this time the witness stated the defendant had a lease only for a year at a time, renewed at the end of the year, which was 6th October. This

witness said, "I know he was a tenant from one year's end to the other—not a yearly tenant;" and he further said that when he wanted (in 1865) another year, "Mr. Becher said he could not give another year." Another witness proved that he went with the plaintiff and demanded possession before this action was brought, and defendant refused to leave unless he was paid for his improvements. The plaintiff then had a conveyance to himself of the land. It was in November 1865. The defendant put in a letter signed by Mr. Becher as follows: "London, 6th October 1861. Dear Sir,—You are at liberty to take possession of the east half of lot 6, first concession Metcalfe, and hold it for one year on the following terms: 1. To pay taxes for 1862. 2. To protect the timber and trees from trespasses; and you are to cut none except for firewood and fencing. 3. You are to expend \$10 in repair of house. 4. You are to notify me at once of your refusal or acceptance." Addressed to the defendant.

He also put in and proved two receipts, signed in Mr. Becher's name by a clerk or partner, as follows: "London, 16th October 1863, \$20. Received from Mr. Robert Thompson (subject to Mr. Becher's approval) twenty dollars on account rent of Metcalfe farm," and "London, Dec. 15, 1864. Received from Mr. Robert Thompson, jun., twenty dollars, being for one year's rent of my lot in Metcalfe, due 1st of July last." Also a receipt signed by Mr. Becher himself—"Received from Mr. Thompson five pounds, one year's rent of my farm at Kerwood. London, 22nd September 1865, up to July last." The defendant also proved that he paid \$20 a year for four years, and that last fall (1865) in October or November he ploughed 17 or 18 acres.

The learned judge charged strongly in favour of the plaintiff, but the jury gave a verdict for the defendant.

In Easter term *Becher, Q.C.*, obtained a rule calling upon the defendant to show cause why a new trial should not be granted, the verdict being contrary to law, evidence, and the judge's charge, and perverse in this, that the disclaimer of the plaintiff's title entitled the plaintiff to a ver-

dict; that the evidence established the plaintiff's title, and that the defendant's term in the premises had expired; and on an affidavit, made by Mr. Becher, that the defendant was his tenant for one year, ending 6th of October 1865, at the rent of £5 and taxes, on an agreement made between them for the said year, at the expiration of his tenancy thereof for the previous year. The affidavit set out the letter proved at the trial, dated 25th of August 1865, and further stated that the defendant shortly after came to Mr. Becher's office, and in presence of Mr. Street, Mr. Becher's partner, asked Mr. B. to let him have the said premises for another year, when Mr. B. distinctly told him he would not, and that he was about to sell it; that though the defendant was tenant for some years, he was always such tenant for one year only, on an agreement and letting made at or about the expiration of the previous year, excepting as to the first year; that he had sold the premises to the plaintiff for £450; that the defendant's counsel on the trial refused to admit the title. He cited *Doe Calvert v. Frowd*, 4 Bing. 560; *Thompson v. Falconer*, 13 C. P. 82.

In this term *C. Robinson, Q.C.*, showed cause, citing *Doe Maitland v. Dillabough*, 5 U. C. R. 214; *M'Gee v. M'Laughlin*, 23 U. C. R. 90.

He filed the defendant's affidavit. The defendant agreed with Mr. Becher as to the terms on which he entered in 1861, and stated that in October 1862 he told Mr. Becher that he had paid the taxes and had expended over \$20 above the \$10 agreed upon, when Mr. B. said, "Remain on, then, at a rent of \$20 a year," or words to that effect, and he did remain, paying the rent yearly, as appears by the receipts of the 15th of December 1864 and the 22nd of September 1865, copies of which were annexed to his affidavit. He admitted the letter of the 25th of August 1865, but said he received no answer, and so went on ploughing; and before receiving Mr. Becher's letter of the 20th of November 1865, of which he annexed a copy, he had ploughed 18 acres. Mr. Becher's letter informed the defendant that he had sold his farm, as he had told the defendant he probably should, and required him to surrender possession or become the tenant of the

plaintiff, if he had not already done so, adding in a post-script, "Of course you can only retain possession with Mr. Houghton's consent." The defendant explained his writing the letter of the 25th of August by saying he had been informed that one Hawkins had purchased the land, and he wrote to know if he could have the place for another year. He said he did go to Mr. Becher's office on the 22nd of September 1865, and paid the rent, but he denied any such conversation then or at any time as is stated in Mr. Becher's affidavit and was sworn to by Mr. Street at the trial. He added that if Mr. Becher had answered the letter of the 25th of August saying he wanted the defendant to leave, he would have left, and could have got a place equally good.

DRAPER, C.J., delivered the judgment of the court.

The whole question is whether the defendant was entitled to notice, and that depends on the terms and character of his holding. As to the terms on which he originally took possession, there is no room for question, for they are in writing; if the same prudent precaution had attended the subsequent dealings, the present difficulty would not have arisen. Looking at what was shown at the trial, we have the holding and the agreement for it from the 6th of October 1861 to the 6th of October 1862; the receipts of the rent for 1862-63 and for 1863-64; both of which are consistent with the defendant's assertion that he was tenant from year to year, though not necessarily opposed to his having made a separate agreement for each of those two years. Then there is his letter of the 25th of August 1865, of which no explanation was given in evidence at the trial, and which is quite inconsistent with the defendant's present contention, which is that he had a right to continue in possession to the 6th of October 1866, because he had not received six months' notice to quit. Then comes the payment in Mr. Becher's office on the 22nd of September 1865, as to which Mr. Street swears he remembers the defendant "coming in to the office for a lease for another year. Mr. Becher said to him he could not get it." The cross-examination of this witness only produced the assertion that the defendant "was a tenant from one year's end to the other, not a yearly

tenant." There was nothing at the trial to contradict this evidence; and it would show that the two receipts above noticed should be applied as proof of the payment of the rent they specify, not as affording an inference of the nature of the tenancy.

Besides, though I have never agreed in the doctrine that if a defendant in ejectment, in giving notice under the Ejectment Act, follows the form given as to denying the plaintiff's title, and adds that he claims as a tenant for a term unexpired, he thereby precludes himself from going into a defence, because the denial in the notice amounts to a disclaimer, I have never questioned the rule, that a defendant in ejectment cannot at the trial first of all compel the plaintiff to prove his title and then set up a tenancy under him. I have sufficiently explained my views as to the effect of the notice of the defendant's title in *Thompson v. Falconer* (13 C. P. 78). But here the defendant not only gave the formal notice that he denied the plaintiff's title, which expressly set up a deed from Mr. Becher, but he left him to prove it, and stood prepared to take advantage of any accidental defect or omission in that proof. I should think, after doing so, he must be taken to have disclaimed, unless he had no notice that the plaintiff was setting up Mr. Becher's title; and of this, as at present advised, I think the plaintiff's notice of title served with the writ of summons is proof. The letter from Mr. Becher, attached to the defendant's affidavit, shows distinct notice of the conveyance and transfer to the plaintiff before the commencement of the action. Mr. Becher's affidavit shows a distinct refusal by the defendant's counsel at the trial to admit the plaintiff's title as stated in the notice, which would in our opinion operate as a disclaimer, and prevent the defendant from claiming the six months' notice if otherwise entitled to it.

We think there should be a new trial, costs to abide the event. Had the objection been taken at the trial, that the defendant having compelled the plaintiff to prove a title, could not set up rights as a tenant under him, and the objection had been overruled, we should have been prepared to give a new trial without costs.

Rule absolute, costs to abide the event.

YATES ET AL. v. LAW.

Building contract—Construction.

Declaration on a contract, by which the plaintiffs agreed to do the carpenter's and joiner's work in erecting a house, etc., for defendant, as shown on the plans prepared by defendant's architect, and to complete the work by the 1st of November, of which house defendant was to complete the residue. It was alleged that it was defendant's duty, and he promised to prosecute his part of the work so as to allow the plaintiffs to complete theirs by the day named, but that defendant delayed so long with the stone-work, etc., that a large portion of plaintiffs' work had to be done in the winter at great additional expense; and further, that defendant did not construct his part of the work according to the plans, so that the timbers provided by the plaintiffs became useless, etc.

Plea (in substance), as to the charge that defendant was to make the residue of the house, and defendant's promise to proceed with the stone-work, and the alleged causes of action in respect thereof—that the defendant employed an architect to invite tenders for the various descriptions of work, and each person tendering was aware that the work not taken by himself was to be tendered for and done by other contractors, not by the defendant; and that the plaintiffs tendered and contracted for their work, being aware that the tenders of other parties for such other work had been accepted; and so the defendant says he did not contract as alleged.

Held, on demurrer, that the plea showed no defence, for the defendant must be treated as having impliedly undertaken to do what was necessary to enable the plaintiffs to proceed with their contract, and the fact of the defendant having with their knowledge employed others, against whom they were without remedy, could make no difference.

THE second count of the declaration was founded on a contract by which, in consideration of certain payments to be made by the defendant, the plaintiffs agreed to do all the carpenter's and joiner's work as specified in erecting a house, outbuildings, entrance gate, and fences, for the defendant, as shown in certain specifications, plans, sections, elevations, block-plans, etc., prepared by the defendant's architect; to provide materials, and to have the work completed by the 2nd of November 1864, of which house, etc., the defendant was to make and complete the residue. It then stated that it was the defendant's duty and that he promised that the plaintiffs should from time to time have access to the house, etc., so to be built, and to the land whereon, etc., and that the defendant would proceed with the stonework, brick-work, plastering, and other works to be done in building said house, etc., and so prosecute the same as to enable the plaintiffs from time to time to execute the works to be by them performed, and to complete the same by the said 1st

of November; that the plaintiffs entered on the execution of the works, and were ready and willing to proceed therewith; that thereupon it became the defendant's duty to proceed with the stonework, brickwork, and plastering, and other works to be by him performed, as far as was necessary to enable the plaintiffs to complete their works by the time specified; but the defendant and his servants, etc., delayed for such an unreasonable time in proceeding with such works, that the plaintiffs were delayed for so long a time in the completion of their works that a large portion was necessarily done after the 1st of November, and during the winter, whereby the plaintiffs incurred great additional expense, and otherwise sustained loss. And the plaintiffs further say that it was the defendant's duty to erect the said house and outbuildings, in so far as the plaintiffs' contract was concerned, of the size and dimensions set forth in the plans, block-plans, elevations, and specifications upon which the plaintiffs made their contract; but the size and dimensions of the house as built by the defendant, so far as related to works to be performed by the plaintiffs according to their contract, were considerably larger than the size and dimensions in the said plans, etc., whereby a large quantity of the joists, timbers, etc., and other materials provided by the plaintiffs after the making of the contract became useless for those works, and the plaintiffs were obliged to get other joists, etc., and the plaintiffs thereby sustained loss. And the plaintiffs further say it was the defendant's duty to build the said house and outbuildings, so far as affected the contract with the plaintiffs, according to the said plans; but owing to the angles of the house, as built by the defendant, not being right angles, as they should have been according to the plans, etc., the works to be done by the plaintiffs were rendered more difficult and expensive than the works called for by the said plans and specifications, whereby the plaintiffs sustained loss. And the plaintiffs further say that they provided materials which were partially manufactured by them for the said building; but owing to the defendant's unreasonable delay, and his refusal to pay any proportion of the value of any materials until they were incorporated

in the building, such materials remained unpaid for for a much longer time than would have been the case but for these delays.

Fifth plea, as to so much of the second count as charges that the defendant was to make and complete the residue of the house, and as relates to the promise of the defendant to proceed with the stonework, brickwork, plastering, and other works therein alleged to be by him to be done and performed, in manner and form as therein is stated, and the alleged causes of action in respect thereof, the defendant says that at the time when he proposed to erect the said house, buildings, and other erections in that count mentioned, he employed an architect to invite tenders for the various descriptions of work to be done and performed in and about the same, and caused certain plans, specifications, and drawings to be prepared, showing the nature of the work to be done by the party or parties tendering or proposing to do the same, and the said specifications were severally headed "plasterer's work," "mason's cut stone and bricklayer's work," "carpenter's and joiner's work," "painter's and glazier's work," "plumber's and gasfitter's work;" and parties tendering were at liberty to tender for the whole or any part of such work, and were severally aware that the portions not tendered for or taken by themselves were open to the acceptance of parties tendering, in the manner hereinbefore mentioned; and the plaintiffs thereupon, with the full knowledge and notice that the other portions beside the carpenter's and joiner's work were to be undertaken by the parties who had tendered therefor, and not by the defendant, and that all the artificers and contractors were to be so mutually engaged and employed in the said undertaking, tendered and offered to perform the said work, in a memorandum signed by them, in the words and figures following—to wit:—

"We hereby agree to do, perform, and execute, in the best workman-like manner, the carpenter's, joiner's work, etc., as specified, in erecting a house, outbuildings, entrance gates, fences, as shown and described in the several plans, sections, elevations, block-plans, etc., under the direction of

the architect, finding the best of materials, labour, tools, etc., requisite for the due performance of the works; to have them completed on or before the first day of November next, for the sum of \$4020, payable at the rate of seventy-five per cent. as the works progress satisfactorily, and the balance on acceptance and completion."

And the plaintiffs so agreed to perform the said work after they became aware that other parties had tendered for the mason's and stone work and other the work hereinbefore in this plea particularly specified, and that their tenders had been accepted, and the defendant accepted the said tender of the plaintiffs; and the defendant says that the said tender and acceptance form and constitute the only contract or agreement between him and the plaintiffs in respect of the said buildings in that count mentioned and the work to be done thereon by the plaintiffs, and are the promise and undertaking in that count and in the introductory part of this plea mentioned. And so the defendant saith that as to the matters herein pleaded to he did not undertake or promise as in that count is alleged.

Demurrer, on the grounds, that such plea in substance and effect confesses and admits the truth of all stated in the second count, or at least of all of it to which such plea applies, and so much of the first count as the second count refers to, adopts, and incorporates as part of itself, thereby admitting that it was agreed between plaintiffs and defendant that the carpenter's and joiner's work of the house, out-buildings, entrance gates, and fences, but only such carpenter's and joiner's work, and the material therefor, were to be made and provided by the plaintiffs for the defendant, according to the specifications, plans, sections, elevations, block-plans, etc., prepared by defendant's architect, and under the direction of such architect, and completed on or before the 1st of November 1864, for \$4020, payable in the instalments in the declaration alleged; from which facts it is necessarily implied by law, as alleged by plaintiffs in that part of their declaration to which such plea is pleaded, that it was defendant's duty, and that he promised and undertook to and with the plaintiffs that they should, from the time of

making said agreement, from time to time at all reasonable times have access to the said house and outbuildings so to be built, and to the land whereon the same was to be erected, and that the defendant would in some manner (whether by himself or his servants, or any other person or persons he should contract with for such purposes, or otherwise howsoever, being utterly immaterial to the plaintiffs) proceed with the stonework, brickwork, plastering, and other works of such house, etc., in such a time and in such a manner as to enable the plaintiffs to perform their contract within the period fixed for its completion; and that the plaintiffs were always ready so to do, and would have completed their said contract within said period but for the default of the defendant to perform his said duty, promise, and undertaking, whereby the plaintiffs were hindered and prevented from completing the same within the time specified, which otherwise they would have done, and were by the delay occasioned by such default of the defendant prevented completing a large portion of their said works until after the expiration of the time specified, and were obliged to complete them in winter instead of summer, at great additional expense to the plaintiffs—yet such plea offers nothing by way of defence beyond alleging in substance and effect, by way of excuse for such admitted breaches of such admitted contract and duty of the defendant to and with the plaintiffs, the following immaterial matters, viz. that such architect was also employed by the defendant to invite tenders for the building and erection of the residue of the said house, for which residue the plaintiffs had not contracted, according to other plans, specifications, and drawings in that behalf;—that the plaintiffs or any one else might have tendered for all or any part of the work, etc., of which such residue of such house was to be composed, and that the plaintiffs knew that, and that others had in fact so tendered, and their tenders been accepted for the completion of such residue of such house, when the contract was made between the plaintiffs and the defendant which is alleged in the part of the declaration to which that plea applies—a portion but not the whole of which contract so admitted to be correct, as alleged in that

part of the declaration, the defendant in that plea (but for what purpose does not appear) professes to set out verbatim.

R. Martin, for the demurrer, cited *Moon v. Guardians of Witney Union*, 3 Bing. N. C. 814; *Great Northern R. W. Co. v. Harrison*, 12 C. B. 576; *Cunningham v. Furniss*, 4 C. P. 514, 516; *Gray v. Pullen*, 34 L. J. Q. B. 265; *Buddle v. Green*, 27 L. J. Ex. 33; *Inchbald v. Western Neilgherry Coffee Co.*, 17 C. B. N. S. 733; *Holme v. Guppy*, 3 M. & W. 387; *Pilkington v. Scott*, 15 M. & W. 657; *Papps v. Melville*, 16 U. C. R. 127; *Lake v. Cameron*, 18 U. C. R. 622; *Regina v. Welch*, 2 E. & B. 362; *Emens v. Elderton*, 4 H. L. Cas. 640, 656.

Burton, Q.C., contra, cited *Upton v. Greenlees*, 17 C. B. 71; *Couch v. Steel*, 3 E. & B. 402; *Winterbottom v. Wright*, 10 M. & W. 116; *Churchward v. The Queen*, L. R. 1 Q. B. 173; *Boorman v. Brown*, 3 Q. B. 511; *Sim v. Edmands*, 18 Jur. 1024.

DRAPER, C.J., delivered the judgment of the court.

The cases of *Holmes v. Guppy* (3 M. & W. 387) and of *Papps v. Melville* (16 U. C. R. 124) clearly show that if the plaintiffs had been sued for not completing the carpenter's and joiner's work by the 1st of November 1864, the facts admitted on this record would afford them a complete defence, upon the ground that the non-performance by the defendant of that which it devolved on him to have done rendered performance by the plaintiffs of their part of the contract impracticable. For it appears to us impossible to hold that the now defendant could recover in such a case, if the house and buildings were not sufficiently advanced for the performance of the carpenter's work, when the difficulty and impediment arose from the neglect and delay of persons who had contracted with the defendant to perform the brick-work, etc., even though the plaintiffs were fully aware of the existence of such contracts when they bound themselves to do the work by a stipulated time.

Here, however, the plaintiffs claim damages because, as

they allege, owing to delay in executing brick and other work which they were not to perform, but which must be done before they could do what they had engaged for, the house was not in a condition to enable them to fulfil their contract within the time limited, and because, in consequence, they had to do their work at a less favourable season, especially in regard to the number of hours per day when they could work. It appears to us a legitimate inference from the cases cited that if the defendant had himself to perform this work the declaration would disclose a good cause of action, and the plea indirectly at least admits this, while it asserts as a defence in effect that the defendant had let out the different kinds of work in the building his house to different contractors, and that the plaintiffs agreed to perform their work after they were fully aware that other parties had tendered for and contracted to perform the other portions of the work.

The plea also avers that the plaintiffs' tender and the defendant's acceptance of it constitutes the whole contract between them, meaning thereby, as we gather, to suggest that the plaintiffs' declaration involves the introduction of an additional term to the contract, viz. that the defendant should execute, or procure to be executed, such other portions of the work and at such times as were necessary to enable the plaintiffs to go on with their undertaking without unreasonable hindrance and delay.

There certainly is no reference in the plaintiffs' tender to the execution of such portion of the building the house, etc., as they were not to do, or to the parties by whom those portions were to be done, whether by the defendant or by contractors with him. This cannot, we think, make any difference; the plaintiffs could not lay joists till the walls were of a proper height, nor rafters till the building was prepared to receive its roof. If the defendant, after making the contract such as he admits it, had done nothing, while the plaintiffs had procured materials and prepared them for use in the building when sufficiently advanced, and owing to the defendant's nonfeasance had sustained loss and damage, they would surely be entitled

to recover compensation; and if so, then on the facts admitted the question is only different in degree. The right of compensation must equally exist, and we cannot see why the fact that the defendant, with the plaintiffs' knowledge, contracted with other parties to do the other parts of the work can affect the plaintiffs' position. They were no parties to those contracts; and if injuriously delayed by the non-fulfilment of them in point of time (and *a fortiori* if those contracts did not require performance in sufficient time to enable the plaintiffs to fulfil their engagements), they could have no remedy against the contractors. So far as the plaintiffs are concerned, it appears to us we must treat the defendant as having impliedly undertaken to do whatever was required to enable the plaintiffs to proceed in the execution of their contract, and his neglect or refusal to do this in our opinion gives them a cause of action; and assuredly, if after contracting with them upon certain plans and specifications he altered his plans, and thereby rendered work already done and materials already provided by the plaintiffs in accordance with the contract of no use, they are entitled to compensation.

We think, therefore, the plea shows no defence, and that the plaintiffs should have judgment on this demurrer. Our judgment is given on the facts as stated on the whole pleadings, as the parties (the defendant's counsel especially) stated their desire that the court should decide as to the plaintiffs' right to recover on the case stated by the declaration, with the additional facts in the pleas. We have abstained from the technical question of form as to the effect of *et sic*; neither counsel alluded to it in the argument.

Judgment for defendant on demurrer.

THE CORPORATION OF THE CITY OF TORONTO *v.* THE GREAT
WESTERN RAILWAY COMPANY.

Railway—Assessment.

The Court of Revision confirmed the assessment of a lot of land occupied by a Railway Company at \$1200 annual value, and assessed the station built upon it at \$1500; and the County Court judge being appealed to confirmed the value of the station, "subject to the question" whether it could be assessed in addition to the land, "and left for the determination of a higher court," whether after the valuation of the land had been fixed in accordance with sec. 30 of the Assessment Act the building could be added.

Held, that this was in effect a confirmation of the assessment, the reservation being inoperative, and that the court had no power to review the decision.

SPECIAL CASE.

THE assessors for the City of Toronto assessed certain land and premises belonging to the Great Western Railway Company, who appealed to the Court of Revision, who assessed the land itself at an annual value of \$1200, and also assessed the large frame railway station erected upon the same lot of land at an annual value of \$1500.

It was stated in the case that the land in question, bounded by Scott Street on the east, Esplanade Street on the south, Yonge Street on the west, and a lane on the north, was a lot on the whole of which the company had erected a building, which, together with the land, was used entirely for railway purposes; that through the building were laid several railway tracks, and on each side thereof, all being upon the premises in question, were placed buildings used for freight-shed, clerk's office, waiting-room for passengers, baggage-room, etc. etc., the building on each side of the track being connected by a roof, and all forming a railway station, being the terminus of the Great Western Railway in Toronto, and no part being used except for railway purposes.

From this assessment the Great Western Railway Company appealed to the judge of the County Court, who confirmed the assessment of the land at an annual value of \$1200, and decided that "subject to the question whether such property could be assessed in addition to the value of the land as previously assessed, by a building thereon used

for railway purposes, he confirmed the value of the large railway station at the sum," etc. (as the Court of Revision had done), "and left for the determination of a higher court whether, after the valuation of the land had been fixed in accordance with the 30th section of the Assessment Act, there was or was not power to add thereto the value of the buildings of the nature in this case described."

The city brought an action for the two amounts which had been imposed as rates upon these separate annual values, and this, by consent of the parties, and by a judge's order, was made a special case for adjudication by this court, without pleadings, the question submitted being "whether the company can be assessed for the value of the buildings used and occupied for railway purposes under the provisions of the Assessment Act, when the land occupied by the railway upon which such buildings rest has been already assessed at the average value of land in the locality as land used for railway purposes.

C. Robinson, Q.C., for the plaintiffs, cited *Great Western R. W. Co. v. Rouse*, 15 U. C. R. 168; *Municipality of London v. G. W. R. W. Co.*, 17 U. C. R. 264; *Consol. Stat. U. C. ch. 55, sec. 30.*

Irving, Q.C., for the defendants, cited *In re Great Western R. W. Co.*, 2 U. C. L. J. 193; *Regina v. Glamorganshire Canal Co.*, 3 E. & E. 186; *Cother v. Midland R. W. Co.*, 2 Phillips, 469.

DRAPER, C.J., delivered the judgment of the court.

This action seems very like an attempt to make this court a tribunal to review the determination of the judge of the County Court under the Assessment Act, the 64th and 68th sections of which appear to us to intend that his decision shall be final.

Supposing that the learned judge of the County Court had simply confirmed the decision of the Court of Revision, we do not imagine it would be questioned that neither in this nor in any other form could his judgment be reviewed. But in place of a simple confirmation the case states that the

learned judge has confirmed it, subject to the question left for the determination of a higher court whether he is right in confirming it or no. We think this is in law a confirmation, and the reservation is inoperative, for the first was his duty, if that was the conclusion he arrived at, and the latter was not contemplated or authorized by the statute. We assume he intended to confirm because he has said he has confirmed, though he has desired to subject his opinion to review or even reversal. But either he has confirmed or he has not discharged the duty cast upon him by the legislature, for he certainly has neither varied nor reversed the decision of the Court of Review.

As to the question itself, as at present advised, we do not think it would be found to present any great difficulty; and if the city assessors or the Court of Revision had put the two annual values into one, as forming the whole valuation of the "land," though there might have been an appeal to the County Judge on the question of excessive valuation, and he must have confirmed or reduced it, we do not see how, under the statute, his decision could have been brought in question.

But for the purpose of determining this case as presented, we have no objection to state our opinion that the judge of the County Court has confirmed the assessment as revised by the Court of Revision, and we think this court cannot review or annul his adjudication.

Judgment for the plaintiffs.

MARKHAM v. THE GREAT WESTERN RAILWAY COMPANY.

Railway Act, sec. 147—Horse not "in charge."

The plaintiff's son, as it was getting dark, was taking three horses along a road which crossed defendants' railway, riding one, leading another, and driving the third. This last horse, being from sixty to one hundred feet in front, attempted to cross the track as a train approached, and was killed—*Held*, upon a bill of exceptions tendered in the County Court and error thereon, that the horse was not "in charge of" any person within Consol. Stat. C. ch. 66, sec. 147, and that the plaintiff could not recover.

ERROR from the County Court of Essex.

Defendants were sued for killing the plaintiff's horse. The defence was rested on the provisions of Consol. Stat. C. ch. 66, secs. 147-149.

It appeared from the plaintiff's evidence that, just as it was getting dark in the evening, the plaintiff's son, nineteen years old, was riding one horse, leading another, and driving a third horse in front along a road crossing the railway.

The horse killed was from sixty to one hundred feet in front of the driver. He apparently heard the train and attempted to run across the track, but was killed when he got half way over. It was blowing so hard that the witness could not hear the train till it was close upon him, and heard no whistle till the train was right upon him; it had just commenced to rain; he said he did not take much notice about the train.

On this it was objected that the plaintiff must fail; that the horse was at large, and not "in charge of" any person, etc., under the statute.

The learned judge, however, left the question to the jury, who found for the plaintiff.

The defendants tendered a bill of exceptions, upon which error was brought to this court.

Irving, Q.C., for the defendants.

Prince, Q.C., contra.

The cases cited are referred to in the judgments.

HAGARTY, J.—The objection comes before us as if on a demurrer to evidence—whether, admitting the truth of the plaintiff's evidence, it was sufficient in law to entitle her to recover.

Was the horse killed "at large," or was it "in charge," within the meaning of the statute?

Cases have occurred under the Act in our own courts nearly approaching to the present.

In *Thompson v. Grand Trunk Railway Co.* (18 U. C. R. 94) a boy was driving four horses loose before him. He drove them through a gate on a road about sixty yards from the crossing. He tried to get ahead of the horses as

he saw the train approaching, but they ran to the crossing and were killed. The late *Sir John Robinson* said: "There could be no stronger case against the plaintiff's recovering, even if there was no such statute in force as the 20 Vict. ch. 12, sec. 16; but with that statute in force there can be not the slightest room for doubt, for we consider it clear that upon the facts proved these horses cannot be held to have been *in charge* of the boy within the meaning of the statute, so that he could prevent their loitering or stopping in the highway at the point of intersection with the railway. If he had had even one of the four horses secured by a bridle or halter, there would have been rather more pretence for admitting the horses to be in his charge, for the others would probably, though not certainly, have remained near the one he was leading."

In the next case in the same volume, *Cooley v. The Grand Trunk Railway Co.* (p. 96), the plaintiff's servant drove his three horses from the barn to the highway, and along the highway to a watering-place existing close to the railway track. He used no halter nor did anything more than drive them loose before him. A train came, and the horses ran on and along the track, and one was killed. It was held that the plaintiff could not recover; the same learned judge saying it was clear that the plaintiff's horse when it got upon the railway was not in charge of any person within the meaning of the statute.

We cannot distinguish the case before us from those cited, unless the fact that the plaintiff's servant was riding one horse and leading the others will enable us to say that the third horse allowed to go loose in front was in his charge.

In the first case cited the Chief Justice notices, without deciding, the aspect of such a state of facts. He says there would have there been rather more pretence for admitting the horse to have been in charge. We are unable to see how the horse driven from sixty to one hundred feet in front of the others, which doubtless were duly "in charge," can be said to have been properly under the man's control. The event showed his utter inability to prevent the animal running on or across the track. Common-sense would sug-

gest that in the dusk of the evening a train rushing rapidly past the point that the witness was approaching would startle a horse so driven, and render him quite unmanageable.

If animals usually driven—viz. oxen, pigs, or sheep—have to approach or cross a railway, we should naturally consider them as “in charge” when the person or persons driving them could readily head them off or turn them if necessary from the track; but a mounted man leading a second horse would be, as happened here, quite unable to stop a horse driven before him and allowed to be from fifteen to twenty-five yards in front. He would be at least equally helpless while he had to manage his own horse and that which he was leading, and at the same time prevent the animal some distance before him from rushing forward to the track, as if he were on foot with all three horses loose before him.

We had occasion in a former case of *M’Gee v. These Defendants* (23 U. C. R. 293) to notice the large object of public safety contemplated by the legislature in making this most salutary provision respecting cattle.* It should not be frittered away by such distinctions as are sought to be established between this and the decided cases.

We think the horse was not under that control and care which a due regard to the lives of the travelling public (if not to railway corporations) required its owner to have provided for it at the time it was killed by defendants’ train; and that the appeal to this court must be allowed, and the judgment below be reversed.

DRAPER, C.J.—I agree in the views expressed by my brother Hagarty, and based upon the judgments of this court given when Sir John Robinson presided over it.

The result of those decisions I take to be, that horses which are driven near or across the railway loose, without halter, bridle, or other similar fastening, and therefore under no actual present check or holdfast, and are not so close to their driver as to be under his immediate manual control and

* See also *Studer v. Buffalo and Lake Huron Railway Co.*, *ante*, p. 163.

restraint, are not "in charge" within the spirit and meaning of sec. 147 of "*The Railway Act*" of this province.

Hence where the evidence for the plaintiff clearly and decisively shows that a horse for the killing of which by their locomotive, etc., an action is brought against a railway company, was not so in charge, the judge presiding at the trial ought, as a matter of law, to rule that the company have incurred no liability whatever.

Courts and juries should never lose sight of what has been so properly adverted to by my learned brother as the object of the provisions in this respect of the Railway Act. It was not merely to protect these companies, but to prevent the recurrence of those frightful catastrophes, so dangerous and destructive to passengers on railway trains, which have been caused by horses and cattle getting upon the railway track. By throwing the responsibility upon the owners of permitting their horses, sheep, swine, or other cattle to be at large upon any highway within half a mile of the intersection of such highway with any railway or grade, unless such cattle are in charge of some person, and depriving them of any remedy against the railway company in case of their cattle, etc., being killed, the legislature make it their interest to diminish one of the risks to which the public are exposed in making use of the railway.

Appeal allowed.

COURTIS v. WEBB.

Chattel mortgage—Sale by mortgagor—Waiver.

E. mortgaged a horse to the defendant in April 1864, and the mortgage contained a proviso that if he should attempt to dispose of the property the defendant might take possession and sell. E. did dispose of the horse to the plaintiff within a few weeks. This mortgage was not refilled, but the defendant took another in February 1865 for the same money, with other advances. In July, having first discovered the sale, he seized under the proviso.

Held, that having neglected to refill the mortgage and taken another, he had lost his right to seize.

APPEAL from the County Court of Middlesex.

Replevin for a horse.

It appeared that one E., on the 1st of April 1864, mortgaged the horse to the defendant, with other property, for the sum of \$115, payable in a year, the mortgage containing a proviso, in the usual form, that in case the mortgagor should attempt to sell or dispose of the property without the consent in writing of the mortgagee the latter might take possession and sell.

A few days after the mortgagor disposed of the horse to the plaintiff.

This mortgage was not refiled at the expiration of a year ; but,

On the 24th of February 1865 another mortgage was given, including this horse, for the sum of \$345, which was made up of the \$115 secured by the previous mortgage and other advances.

In July following, the defendant having, as he alleged, discovered for the first time that the horse had been disposed of, seized it under the power contained in the first mortgage ; and the plaintiff replevied.

After argument in the court below, the learned judge held that the mortgagor having failed to exercise the power within the year, or to refile the mortgage, and having accepted a second mortgage upon the same property, had waived his right, referring to *M'Martin v. M'Dougall*, 10 U. C. R. 399 as in point. From this decision the defendant appealed.

C. Robinson, Q.C., for the appellant, contended that the moment the mortgagor parted with the horse, it became by virtue of the mortgage vested in the defendant, and that the property and right of possession which then accrued to him was not defeated by what had since taken place.

M. C. Cameron, Q.C., contra, was not called upon.

The court held that the decision of the court below was right.

Appeal dismissed.

THE CORPORATION OF THE COUNTY OF LINCOLN *v.* THE
CORPORATION OF THE TOWN OF NIAGARA.

By-Law—Equalization of Rates—C. S. U. C. ch. 54, secs. 28, 32, 70, 73.

Declaration on a county by-law to levy money for the general purposes of the year, alleging non-payment by the defendants of the proportion to be raised by them. *Plea*, that in capitalizing the real property not actually rented, but held and occupied by the owners in the towns of N. (the defendants) and C. and the village of D., and in capitalizing the ratable personal property there for the year, the plaintiffs capitalized at ten instead of six per cent., as directed by law, and apportioned thereon among the several municipalities, whereby \$1,000,000 was omitted from the capitalization, and the aggregate value of the ratable property in N., and the amount directed to be raised there, was erroneously and illegally made up.

Held, on demurrer, a good defence, for such capitalization was contrary to the statute; and though it lessened the defendants' assessment they were not precluded from objecting, for the plaintiffs could only create a debt by complying with the Act. *Held*, also, that it was unnecessary to quash the by-law, for the court in their discretion might decline to do that, though they could not deny the defendants' right to contest their liability on any legal ground.

THE declaration contained two counts. The first set out a by-law passed by the plaintiffs on the 27th of May 1863, which recited, among other things, that it was necessary to raise \$8865 for general purposes for the current year, and enacted that such sum should be levied and collected upon all the ratable property in the county, and should be apportioned among the several municipalities therein, according to a schedule set forth, in which the proportion to be paid by the town of Niagara was \$588; that the plaintiffs by the said by-law required the defendants to raise, levy, and pay over to the plaintiffs, within the year 1863, such sum of \$588. Averment of notice to the defendants, and that the clerk of the peace did before the 1st of August 1863 certify to the clerk of the defendants the total amount directed to be levied in the town of Niagara for that year for county purposes. Breach, non-payment of that sum.

The second count set forth a similar by-law passed in 1864, reciting the necessity of raising \$11,291, and stating the proportion to be paid by the town of Niagara at \$479 for that year for county purposes; and after similar averments, concluded with a similar breach.

Plea.—To the first count—that before the passing of the said by-law in the first count mentioned, the said plaintiffs,

in capitalizing for the purposes of assessment for the year 1863 the real property not actually rented but held and occupied by the owners thereof in the towns of St. Catharines and Niagara, and in the village of Port Dalhousie, municipalities of the said County of Lincoln, and also in capitalizing the ratable personal property for the said year 1863, in the said towns and village, capitalized the same at ten per cent. instead of at six per cent., as directed by law, and that in making the said apportionment in the said by-law among the townships of the said county and the said towns and village, the said plaintiffs made such apportionment upon the said capitalization of ten per cent. herein mentioned, whereby the large sum of money of one million dollars was omitted from the amount of the said capitalization, and the aggregate value of the ratable property of the said town of Niagara was thereby wrongly and illegally made up by the said plaintiffs, and the amount by the said by-law directed to be raised and levied as the ratable property of the said town of Niagara was also erroneously and illegally made up in the said apportionment, and was another and different amount than the amount should and would have been if the plaintiffs had capitalized the said real and personal property in the said towns and village at six per cent., as directed and authorized by law—whereby the defendants say that they have incurred no liability to the plaintiffs under the said by-law as in said first count alleged.

Similar plea, *mutatis mutandis*, to the second count.

Demurrer, on the grounds—1. That the facts stated in the said pleas would not, if true, render the said by-laws invalid or illegal.

2. That by the mode adopted by the plaintiffs in capitalizing the ratable property of the said towns and apportioning the same, the amount to be levied and raised by the defendants would be much less than if the said real and personal property had been capitalized at six per cent., and it does not lie with the defendants to make the objection.

3. That the defendants should have moved to quash the said by-law, and cannot take the objections by way of plea.

4. That if the defendants were damaged by the said mode

of capitalizing, it should have been shown and pleaded by way of equitable plea.

W. Eccles and *Robert A. Harrison*, for the demurrer, cited *Fisher v. The Municipal Council of Vaughan*, 10 U. C. R. 492; *Gibson and the Corporation of Huron and Bruce*, 20 U. C. R. 120; *Secord and the Corporation of Lincoln*, 24 U. C. R. 142; *Consol. Stat. U. C. ch. 54*, secs. 10, 19, 28, 29, 32, 70, 71, 73, 75-77.

J. H. Cameron, Q.C., contra.

DRAPER, C.J., delivered the judgment of the court.

The defence set up to the declaration is in effect that the amount claimed by the plaintiffs by each of these by-laws has not been legally arrived at according to the directions of the Assessment Act, by which both parties are bound; that as to real property not actually rented, but held and occupied by the owners, as well as to personal property generally, it was "capitalized" at ten per cent. instead of six, upon its annual value, whereby a sum of \$1,000,000 has been omitted from the proper aggregate valuation of all the property in the county liable to be rated and assessed; that the aggregate value of the ratable property in the town of Niagara was illegally made, and the sum of money directed by the by-law to be raised was illegally arrived at (*i.e.* not according to the statute), and was different from what it would have been if the plaintiffs had capitalized the real and personal property in the towns and incorporated villages in the county at six per cent. And on this ground the defendants say they have not become indebted to the plaintiffs, for a debt of the nature claimed could only be created in the manner and form prescribed by the Assessment Act.

The method of capitalization alleged in the plea to have been adopted is to the advantage of towns and villages; for if the taxable value had been ascertained as the statute directs, the aggregate sum upon which the rates should be calculated would be larger than it is in the mode adopted. The defendants have not any overcharge to complain of, but

broadly deny liability to pay anything until the amount of liability has been settled as the law directs.

We do not understand the plaintiffs to contend that they have followed the 28th and 32nd sections of the Assessment Act; but it has been argued that the 70th section gives to the county council an unfettered discretion to increase or decrease the aggregate valuation of real property in any township, town, or village, so as to produce a just relation between all the valuations of real estate in the county, so long as they do not reduce the aggregate valuation of real estate for the whole county.

As to this, the authority given is to be exercised for the purpose of ascertaining whether the valuation made by the assessors in each township, etc., bears a just relation to the valuations so made in all the townships, etc.; and for the purpose of county rates the county councils may increase or decrease the aggregate valuation of *real property*, not reducing the aggregate valuation thereof for the whole county. This latter restriction renders it necessary, if the valuation made by the assessors for any township, etc., is decreased, to increase the valuation in some one or more of the other townships, etc.—in other words, they must take the aggregate value of real property in each municipality ascertained in the manner the statute directs, and then, in order to produce the “just relation” spoken of, they may decrease or increase such aggregate value in such of the several municipalities as they judge to be necessary, still preserving the same sum as the aggregate valuation for the whole county as was the result of the assessors’ valuation in their several municipalities. Moreover, the authority thus given does not extend to personal property, the yearly value of which is, by section 32, fixed at six per cent. of its actual value, the latter value being declared by the assessors subject to appeal, but which is not subjected to a change by the county council. This 70th section does not therefore, in our opinion, afford an answer to the plea so far as real property is concerned, and certainly does not justify the substitution of ten per cent. for six per cent. in converting yearly into actual value in any case.

The sum-total of the *rentals* assessed in towns and villages, as distinguished from the local value of other real property and of personal property, is the subject-matter dealt with by the 73rd section. These rentals are to be calculated in making the apportionment of the county rate at ten per cent. on the capital represented. The plea observes the distinction thus created, by not objecting that real property actually rented is capitalized at ten and not at six per cent.; the objection is limited to real property held and occupied by the owners and ratable personal property.

Although we do not inquire into the *modus operandi* by which the county council endeavour to produce a just relation between all the valuations of real estate in the county, we do not think we are at liberty to uphold a violation of the express provision of the statute as to the manner in which the actual values are to be ascertained. The plea does not assert either increase or decrease of the aggregate valuation of real property in the town of Niagara, which, so far as the assessors were concerned, would have been expressed in the form of a rental or annual value of each separate parcel. (See sec. 19, sub-sec. 4.) What the plea relies on is that the county council, while adopting the assessors' return of rental and yearly value, have converted the same into capital or actual value in a different manner from that directed by the statute, and this is admitted by the demurrer. We do not agree in the argument that the 73rd section overrides the 28th. The two can well stand together, and must be construed accordingly.

There are two other objections taken as grounds of demurrer to which it is only necessary to make brief allusion: First, That by the mode of capitalization adopted the defendants are assessed upon a much less sum than would be the case if the statutory direction had been followed, and it does not lie with them to take the objection. The answer is obvious. Except under the statute the county council could not impose a rate at all on the defendants; and the mode in which they shall exercise the power conferred being expressly designated, they cannot substitute a different mode leading to a different result. The plaintiffs claim a

debt and must show the obligation lawfully created; the foundation of their claim is their by-law, and that depends for its validity on the statute, which it is admitted has not been followed. If there is no legal by-law, there is no debt.

Secondly, It is said the defendants should have moved to quash the by-law. On such motions the court have a discretion to exercise, but here the plaintiffs come into a court of law to recover under their own by-law; the court have no discretion to deny to the defendants the right of contesting on any legal ground their liability to pay.

On the whole, we are of opinion the defendants are entitled to our judgment. In *Secord v. The Corporation of Lincoln* (24 U. C. R. 142) we intimated very plainly the leaning of our opinion on this very question, and the present case confirms us in what we then threw out as to the exercise of the powers of the county council.

Judgment for the defendants on demurrer.

YOUNG ET AL. (FIVE PLAINTIFFS) v. TAYLOR.

Contract—Payment—Estoppel.

The plaintiffs sued the defendant for \$150, money lent, to which the defendant pleaded a set-off against L., one of the plaintiffs, accepted by L. in satisfaction. It appeared that the defendant having built a house for L., cross demands arose out of the contract, and their solicitors negotiated for a settlement; that the \$150 was mentioned, and L.'s solicitor offered to pay \$650 in full of all matters, taking this \$150 into account as a credit to L. The defendant refused to take less than \$700, and sued L., whose solicitor, before he was aware of the suit, paid \$650, and afterwards paid \$50 into court, which was taken out.

The jury were asked whether L. or his attorney agreed absolutely to allow the \$150 as a payment on the contract, or only for the sake of a settlement, which was not arrived at; to which the defendant objected, that if the negotiations proceeded on the supposition that the \$150 was to be so allowed, and L. afterwards paid the \$700 on a different understanding, he was bound so to state at the time.

Held, that the direction was right, and a verdict for the plaintiffs was upheld.

APPEAL from the County Court of Wentworth.

Declaration on the common counts.

Pleas.—1. Never indebted. 2. Payment. 3. Set-off.
4. That before action David Law, one of the said plaintiffs,

was indebted to the defendant in an amount greater than the said plaintiffs' claim, for work done, etc.; and the said David Law being so indebted, the defendant set off and allowed to him the money claimed herein against the same amount, parcel of the said sum so due by him to the defendant, and in satisfaction of so much thereof, which set-off and allowance the said David Law then accepted in full satisfaction and discharge of the money claimed herein.

At the trial in the County Court the plaintiffs put in the following receipt signed by the defendant: "Hamilton, 9th March 1865. Received from Messrs. Young, Law, & Co. the sum of one hundred and fifty dollars as a loan, and to be repaid on demand. It is distinctly understood that this loan is separate and distinct from any transactions I have had or may have with Mr. Law, and that I cannot use it as a set-off for any claims I may have against him."

For the defence, several architect's certificates of work done by the defendant for the plaintiff David Law were produced, with receipts indorsed; and receipts for certain sums advanced by the plaintiffs to defendant, to be deducted from such certificates, amounting together to the sum of \$2850.

Francis Mackelcan then gave evidence as follows: Defendant in May of last year gave me instructions to bring an action against David Law for the balance of his account. I wrote to him, and a day or two after Mr. Burton called on me on his (Mr. Law's) behalf. Taylor's claim was \$3721, and he gave credit for \$3000. That sum of \$3000 included the \$2850 paid, as shown by the receipts, and the \$150 sued in this action. Mr. Burton talked over the matter with me. He spoke of \$3000 having been paid. \$394 was admitted by him as being due for extras, but Mr. Burton claimed damages sustained by Mr. Law in consequence of delay in completing the building. Afterwards Mr. Burton offered to pay \$650 in full of all demands, and Taylor would not take less than \$700. The \$700 was ultimately paid and accepted in full satisfaction of the claim. I allowed credit for the \$150 now sued for, and Mr. Burton claimed the \$150 as a credit. A suit was commenced against Mr.

Law. I received on account the \$650 offered by Mr. Burton and he afterwards paid \$50 into court ; it was a compromise and settlement of the claim. There was nothing said by Mr. Burton when he tendered the money about the \$150. Mr. Law made a claim for unsettled damages for detention in completing the building, and the money paid by Mr. Burton was paid in settlement of all claims. The writ was issued on the 22nd of August last, and the money was paid on the 24th. The writ produced is the writ in that action.

For the plaintiffs, in reply, examined copies of the pleadings in the suit "*Taylor v. Law*," were produced, showing it to have been an action on the common counts, in which the pleas were—1. As to all but \$700, never indebted. 2. As to all but \$700, payment before action. 3. As to \$650, payment after action. 4. As to \$50, residue, payment into court. Replication dated 29th of September 1865, accepting said sum of \$50 in satisfaction. *Nolle prosequi* as to residue.

George W. Burton was then called, and said : I acted as Mr. Law's attorney in the suit brought by Taylor against Law. I called on Mr. Mackelcan to try and arrange the matter. Mr. Law claimed \$600 damages ; \$2850 was admitted to be paid on account ; Mr. Mackelcan claimed \$650 besides the \$2850 and the \$150. In order to get a settlement, and to save a cross action for the \$150, I offered to allow the \$150, and agreed to pay balance of \$650 claimed, but it was only offered for the purpose of a settlement. It is untrue that I ever admitted that the \$150 had been paid on the contract, or that I agreed to allow the \$150 except for the sake of a settlement. If the offer of \$650 had been accepted, the \$150 would have been included in the settlement, but the negotiations were broken off. Mr. Mackelcan came to me some days after offering to accept the \$650, and told me that he could not take less than the \$700. He did not tell me that a writ had been issued at the time. I refused to pay the \$700 as a compromise, but paid the \$650, and afterwards paid into court the extra \$50 under a plea of payment into court. When Mr. Law, on my advice, agreed to pay the \$50 into court, he told me to bear in mind

the plaintiffs' claim for \$150, and not to allow it to be taken into account. We paid into court the amount of the contract, and the amount we allowed as extras. I did not intend to allow the \$150; did not tell Mr. Mackelcan so; it was unnecessary to do so, as the compromise failed. I swear most distinctly that I did not claim the \$150 as a payment on the contract. I mentioned \$2850 only as being the payment made on the contract. I had no memorandum at Mr. Mackelcan's office containing the \$150 as a payment.

Mr. Mackelcan, being recalled for the defence, said: Mr. Burton had a memorandum with him containing entries showing \$3000 as a payment. Mr. Burton did not speak of the \$150 specifically as a payment, but admitted the \$3000 as having been paid on account.

The learned judge left it to the jury to determine whether or not at the time of the negotiations for a settlement between Mr. Mackelcan and Mr. Burton, Mr. Law in person or by his attorney assented or agreed to the allowance of the \$150 as a payment on account of the contract, or whether the assent of Mr. Burton to allow the \$150 was made only for the sake of a settlement, and that the settlement failed to take effect. In the first case the defendant would be entitled to succeed on the fourth plea, otherwise the verdict should be for the plaintiffs.

Mr. Freeman, for defendant, objected to this charge, and said the jury should have been told that if the \$150 was to have been carried against the defendant, and the whole negotiations took place upon the supposition that the \$3000 had been paid on account, if the plaintiff Law subsequently made an offer having in his mind that the \$150 was not to be allowed, that fact should have been disclosed, and not having been disclosed the verdict should be for the defendant.

The jury found a verdict for the plaintiff for \$150.

On motion for a new trial in the following term on that and other grounds, the rule was discharged, and the defendant appealed, the ground assigned being that taken at the trial.

M. C. Cameron, Q.C., for the appellant, cited *Cornish v. Abington*, 4 H. & N. 549, and the cases there referred to,

Sadleir, contra, cited *Clark v. Hurlburt*, 6 C. P. 438; *M'Kinstry v. Furby*, 24 U. C. R. 176; *Ford v. Lacy*, 30 L. J. Rep. Ex. 352.

DRAPER, C.J.—The facts in evidence necessary for consideration appear to me to be that the plaintiffs' case rested on the following receipt, signed by the defendant, dated 9th March 1865: "Received from Messrs. Young, Law & Co." (the five plaintiffs) "the sum of \$150 as a loan, to be paid on demand. It is distinctly understood that this loan is separate and distinct from any transactions I have had or may have with Mr. Law, and that I cannot use it as a set-off for any claim I may have against him."

The defendant had as a contractor erected a house, etc., for the plaintiff David Law. The defendant claimed a large sum as due him on the contract and for extras. Mr. Law claimed a large sum as damages for not completing the contract within the stipulated time. The defendant's solicitor (Mr. M.) wrote to Mr. Law to pay the defendant's claim, and his solicitor (Mr. B.) went to Mr. M. on the subject, and they negotiated for a settlement of their differences. Both solicitors were examined at the trial. Mr. M. stated that credit was claimed and taken on the defendant Law's account for the \$150 mentioned in the above receipt, and that Mr. B. had a memorandum including it and making the credits claimed by the defendant Law \$3000. Mr. B. denied having any such memorandum, but said that with a view to an amicable settlement he did offer so to settle this sum, if the defendant would accept a sum he then offered as a full payment, closing their transactions. This was refused, and the defendant sued out a writ against Law, who immediately paid \$650, and afterwards paid \$50 more on a plea of payment into court. The defendant took out this last sum as satisfying his claim. Some months afterwards this action was brought, and at the trial the learned judge asked the jury to say whether the defendant Law, in person or by his attorney, agreed to allow the \$150 as a payment on the building contract, or whether the assent of Mr. B. to allow the \$150 was made only for the sake of a settlement,

which settlement was not arrived at. The jury, by finding for the plaintiffs, have adopted Mr. B.'s statement in this respect.

The argument before us has been that the evidence brought the case within the principle, that if a person by actual expressions or by a course of conduct so conducts himself that another acts upon the inference of agreement reasonably to be drawn from such expressions or conduct, thereby altering his position, the party using the expressions or so conducting himself cannot gainsay that reasonable inference or escape the consequences. *Cornish v. Abington* (4 H. & N. 549), *Freeman v. Cook* (2 Ex. 654), and that class of cases were relied on.

Before the learned judge could have adopted the direction the absence of which is complained of, he must have held that there was sufficient evidence that the plaintiff Law, through Mr. B., had used expressions or done some acts sufficient to give rise to the inference that he claimed and took credit for this sum absolutely. All that was said or done took place between the two solicitors; and though they agree that what was said or done in reference to the \$150 was when Mr. B. negotiated for a settlement, which was refused by Mr. M., they differ in this: Mr. M. treats this sum as claimed absolutely as a payment made by Mr. Law. Mr. B. says the offer was made *sub modo*, and that his proposition being rejected, the parties were restored to their condition as it existed before the negotiation. The question left to the jury was whether Mr. Law had agreed absolutely or only proposed conditionally to allow the \$150. They have believed the latter, and so have determined that the \$150 was not absolutely carried to account against the defendant, and in so determining they have in effect decided that Mr. B.'s conduct and language as Mr. Law's agent was conditional only.

Under these circumstances I think the learned judge was right in declining to ask the jury to find what understanding or belief the defendant had in his mind when after being sued he paid the \$650, or afterwards paid the \$50 into court. I think this would be an extension of the doctrine

of *Freeman v. Cook*, not justified by anything that class of cases contain or decide.

In my opinion the appeal should be dismissed.

HAGARTY, J.—We see no reason to question the finding of the jury on the evidence; the only point is whether the learned judge was bound in law to charge as requested by the defendant's counsel. The defence turned wholly on the fourth plea. Defendant certainly owed the \$150 to these plaintiffs. Was this amount set off and allowed in the settlement of accounts between David Law and the defendant in their private transactions, and was such set-off accepted by one of the plaintiffs, David Law, in satisfaction of the money claimed in this suit by him and his copartners?

Had Mr. Burton and Mr. Mackelcan succeeded in settling before action brought, it is clear that the \$150 would have been allowed, and Mr. Burton offered \$650, intending to allow it. This was declined, and \$700 insisted on, and the parties could not agree. After this Mr. Burton, not knowing that a suit was actually commenced two days before, paid \$650 to Mackelcan, who again said he could not take less than \$700. As a defence to the action, Burton paid a further sum of \$50 into court.

We think a strong distinction should be drawn between what occurred in this negotiation for a settlement, while Mr. Burton was in ignorance of any action being brought, and merely looking to an amicable adjustment of all disputes, and his conduct in paying money into court when he found that Taylor was proceeding to enforce his rights by legal process. In defending one copartner for his private debt, Mr. Burton might be well satisfied that he could not legally off-set the claim of the firm for a joint advance. I cannot see that as a matter of law he was bound, in paying the additional \$50 into court, to notify Taylor that he would still claim from him the debt due to the firm. The idea of compromise might fairly be said to be at an end when Taylor brought his action. If the latter had declined to accept the money paid into court in full, and had gone to trial for further damages, Mr. Burton and his client must have felt that

they could not ask the jury to allow the joint claim now sued upon, as a payment or credit to be applied to the one partner's private debt.

The objection taken at the trial, and the direction suggested to the learned judge, might have been, and probably were, pressed on the jury as an argument in support of the plea. We find it, however, impossible to say that the judge was wrong in point of law in refusing so to charge. We fully agree with the law laid down in the case in 4 H. & N. 549, cited by Mr. Cameron.

As a matter of fact, the jury find that the plaintiffs' claim in this suit was not satisfied by the settlement between David Law and the defendant; and it may be open to very serious doubt whether the joint debt due to these plaintiffs by Taylor could be held to be paid or satisfied, because Taylor, in accepting a particular sum from one of the four for his private debt, was under an erroneous impression, even if imputable to the conduct of his debtor, that his own debt to the firm was to be thereby extinguished, when in fact it was not so. It is hardly necessary to enter into the wide inquiry thus suggested.

The actual direction to the jury was, we think, as favourable to the appellant's contention as it could have been, and might possibly be at least as open to objection on the respondent's part. We, at all events, think that the ground of appeal fails; that the learned judge was not bound to adopt the suggested direction; and that the appeal must be dismissed.

Appeal dismissed.

THORNTON v. THE SANDWICH STREET PLANK ROAD
COMPANY.

Corporation—Contract ultra vires—Executed Consideration.

Defendants being a Joint-Stock Road Company under Consol. Stat. U. C. ch. 49, contracted with the plaintiff to build for them four additional miles, an extension of the road originally contemplated, and to pay him by the tolls to be collected there and on three other miles of the road. This mode of payment was not authorized by the Act (sec. 32), but the plaintiff built the road, the defendants accepted it and levied tolls upon it, and after handing them over to him for some time, refused to allow him to receive more, or to pay him for the work done.

Held, that they were liable upon the common counts.

THE first count of the declaration, upon a special agreement, alleged that the defendants being incorporated under the Consol. Stat. U. C. ch. 49, and having constructed and being possessed of a plank road in the township of Sandwich East, and the directors of the said company then being of opinion that it was desirable to extend their said line of road, and for that purpose to construct the four miles of gravel road in this count mentioned, they, the defendants, thereupon, on the 22nd of May 1856, by their agreement in writing, sealed with their seal, in consideration that the plaintiff should build, construct, and completely finish four miles of gravel road for the defendants, for the sum of £1625, to be paid by the defendants to the plaintiff by tolls to be collected on the said four miles of road and on three other miles of road belonging to the defendants, covenanted with the plaintiff that he, the said plaintiff, should receive all the tolls which should after the making of the said agreement be collected on the said seven miles of road, until the said plaintiff should be wholly paid and satisfied the said sum of £1625 with interest, etc. And the plaintiff duly built, constructed, and completely finished the said four miles of gravel road by him agreed to be built, constructed, and completed; and all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to receive all tolls that were collected after the making of the said agreement upon the said seven miles of road; and the said sum of £1625, and the interest thereon, was not paid or satisfied to the plaintiff, but yet remains wholly due; yet the defendants have refused to allow the

plaintiff to receive the said tolls collected upon the said seven miles of road since the making of the said agreement, but have themselves received a large sum of money for said tolls, and refuse to pay the same to the plaintiff, to the damage of the plaintiff.

There was another special count upon the same agreement, and common counts were added for work and materials, etc.

The defendants pleaded, to the special counts, 1. *Non est factum*; 2. Payment: and to the common counts, 1. Never indebted; 2. Set-off; 3. Payment.

The evidence was in substance the same as at a previous trial of the case (reported in 24 U. C. R. 337), which proved useless for want chiefly of sufficient information as to what part of the road it was to which the agreement applied. On this trial it appeared that the defendants were incorporated on the 27th of January 1863 to construct a road from the town of Sandwich to the ridge crossing the town line between the townships of Maidstone and Colchester, 16½ miles, and that the extension covered by the plaintiff's contract was from this point easterly through the township of Colchester eighty chains, and into the township of Gosfield thirty chains. This extension, though within the powers conferred on the defendants by the 32nd section of the Act, was not resolved on or adopted in the manner provided by that clause, which, according to the decision in the previous case, does not sanction a disposition of the tolls such as stipulated for by the contract. The plaintiff, however, built the four miles contracted for; the company put tolls upon it, and for some time paid them over to him in accordance with the agreement; but about two years ago a new set of directors was elected, and they refused to pay more, which gave rise to this action.

It was objected for the defence that the contract was *ultra vires*,

1. Because the defendants had no authority to make the road over the ground upon which it was contracted to be made; and

2. In consequence of the provision made for payment.

A verdict was entered for the plaintiff, subject to the

opinion of the court, and damages assessed at \$7821, 60c., the court to draw inferences of fact as a jury, and to enter such verdict as the evidence might warrant.

C. Robinson, Q.C., for the plaintiffs, cited Consol. Stat. U. C. ch. 49, secs. 32, 60, 70, 75, 84, 112; *Nelson and Nassagaweya Road Co. v. Bates*, 12 U. C. R. 586; *Wingate v. Enniskillen Oil Co.*, 14 C. P. 379; *Clark v. Mechanics' Institute*, 12 U. C. R. 178, 191.

Anderson, for the defendants.

DRAPER, C.J.—The plaintiff in this case has done for the defendants the work mentioned in the first count of the declaration; the defendants have accepted and are in the actual enjoyment of it, and in receipt of the profits arising from tolls collected by them from the public, who make use of the work.

The defendants deny liability, because in the contract they covenanted to do that which they had no legal authority to agree to do; and therefore, because they cannot legally pay and satisfy the plaintiff in the way expressed in their covenant, they in effect say they will keep his work, take the entire benefit and profit of it, and pay nothing.

We have already expressed our opinion in the case, that the disposition of the tolls made by the agreement was not authorized by the statute. The plaintiff then must rely upon the common counts, and it is shown that the defendants have actually accepted and derive profit from his work. I think they cannot be heard to set up, that because they covenanted to pay him by appropriating the tolls in a manner not authorized by law, they can take his work and pay nothing for it.

After considering all the decisions in England and here, including the very late case of *Nicholson v. The Bradfield Union* (L. R. 1 Q. B. 620), and the gradual tendency to relax the strict rule which upon the whole is manifested in them, I think we are warranted in holding that this is a case of executed consideration, and that the defendants are estopped from denying their liability for work done under

their covenant, and of which they are actually enjoying the benefit.

I think the value of the work should be deemed to be what the plaintiff agreed to do it for, as there is evidence that it is worth that sum; and that he should have interest at the rate of six per cent. on the price of each portion from the time the defendants accepted it, giving credit with interest for what he has received.

HAGARTY, J.—I concur in the judgment just delivered, and desire only to add that it is in my opinion a very important point in the case, that the defendants, as a corporation, are exercising corporate powers over the road made by the plaintiff, and making the public pay tolls there, while at the same time they say as a defence that they have no right to it.

Judgment for plaintiff.

JONES ET AL. v. GRESS.

Arrest—Affidavit to hold to bail—Application for discharge.

An affidavit on which an order to hold to bail had been issued, stated that defendant was indebted to the plaintiff in \$2615, being the amount of four several promissory notes made by defendant, bearing date the 6th of February 1866, for \$653, 75c. each, payable respectively at forty days, sixty days, three months, and four months after date; and that said notes were given by defendant for goods purchased by defendant from the plaintiff. On motion to set aside the arrest, it was objected that this affidavit did not show to whom the notes were made payable, nor in what character the plaintiff held them—but, *Held*, that it was sufficient. The defendant swore that he had not at the time of his arrest, or of making his affidavit, any intention of quitting Canada with intent to defraud the plaintiff of his debt, but he did not deny or explain any of the facts sworn to by the plaintiff on obtaining the order; and the court, holding that these facts justified the arrest, refused to order his discharge.

C. Robinson, Q.C., obtained a rule, calling upon the plaintiffs to show cause why the order made by Ephraim Jones Parke, Esquire, deputy judge of the county court of Middlesex, and the writ of *capias* issued in this cause, and the arrest of the defendant thereon, should not be set aside for irregularity, with costs; or why the said writ and arrest should not be set aside for irregularity, with costs.

1st, Because it is not sufficiently shown in the affidavit to

hold to bail, on which the said order was granted, that the promissory notes referred to in the said affidavit were overdue and unpaid at the time when the said affidavit was made, nor to whom the said notes were made payable, nor that the plaintiffs were then the holders thereof, nor in what character the plaintiffs claim to recover upon such notes, whether as payees or indorsees, nor how they became entitled to the said notes; and the plaintiffs' cause of action does not sufficiently appear in the said affidavit.

2nd, Because the affidavit does not sufficiently show that there was good and probable cause for believing that the defendant, unless forthwith apprehended, was about to quit Canada, with intent to defraud his creditors generally or the plaintiffs in particular:

Or why, on the grounds aforesaid, the order made in Chambers by *Mr. Justice Adam Wilson*, on the 7th of July last, should not be rescinded, or why the arrest of the said defendant under the said writ should not be set aside, and an order made to discharge the defendant from the sheriff's custody, upon such terms as this court may impose, on the ground that at the time of making the order for the arrest the defendant had not nor has he now any intention of quitting Canada with intent to defraud the plaintiffs of their said debt.

John Duggan, Q.C., showed cause, citing *Allman v. Kensel*, 3 P. R. 111; *M'Innes v. Macklin*, 6 U. C. L. J. 14.

Robinson, Q.C., contra, cited Ch. Arch. Prac. 12th ed. 751, 753-756; *Case v. M'Veigh*, R. & H. Dig. 47; *Brett v. Smith*, 1 P. R. 309, 317; *Lewis v. Gompertrz*, 2 C. & J. 352; *Demill v. Easterbrook*, 10 U. C. L. J. 246; *Brown v. Riddell*, 13 C. P. 457.

[HAGARTY, J., referred to *Graham v. Sandrinelli*, 16 M. & W. 191.]

DRAPER, C.J., delivered the judgment of the court.

The affidavit on which the order to arrest was obtained does not state to whom the promissory notes set forth therein were made payable, nor in what character the

plaintiffs hold these notes. These omissions are the ground of *Mr. Robinson's* first objection.

The statement in the affidavit, which is made by one of the plaintiffs, as to the notes, is that the defendant, now residing in the city of London, county of Middlesex, is indebted to the plaintiffs (naming them) in the sum of \$2615, United States currency, equal at the time of making the affidavit to \$1673 lawful money of Canada, being "the amount of four several promissory notes, made by said William B. Gress, bearing date the sixth day of February, in the year of our Lord one thousand eight hundred and sixty-six, for the sum of six hundred and fifty-three $\frac{75}{100}$ dollars each, payable respectively at forty days after date, sixty days after date, three months after date, and four months after date, given in the city of New York aforesaid" (previously stated to be in the state of New York, one of the United States of America), "payable in the city of Cincinnati," and "that the said promissory notes were given by the said William B. Gress for goods purchased by him from said Jones, Sheppard, and myself" (the plaintiffs), "who are partners carrying on business in the city of New York aforesaid."

The foregoing statement shows the date of and the time at which each note became payable; and as the affidavit was sworn on the 26th of June 1866, all the notes, according to the date and the time each had to run, were overdue. It shows also the character in which the defendant became party to the notes; it shows the amount of each note and the aggregate amount of the four, and, though not necessary, it shows the consideration for which the notes were given.

But it does not show to whom the notes were made payable, nor in what character the plaintiffs held them. This objection is answered by the case of *Bradshaw v. Saddington* (7 East, 94), where the affidavit stated that the defendant was indebted to the plaintiff in the sum of £100, "upon and by virtue of a certain bill of exchange drawn by the said defendant, and long since due and unpaid." A precisely similar objection was taken, but the court held that the affidavit sufficiently indicated the ground on which the

defendant was held to bail, *i.e.* on a bill of exchange drawn by defendant "on which he was justly *indebted* to plaintiff;" that it was not necessary for the plaintiff to specify in what particular character, whether as payee or indorsee, he claimed; if he had no interest in the bill on which he could sue the defendant, he would be guilty of perjury. And this case affords an answer to the other branch of the objection, that it is not shown to whom the notes were payable. If the plaintiffs were the payees, and that fact need not be stated, it cannot be necessary to show that the notes were payable to them; and if the notes were drawn payable to another, if it be unnecessary for the plaintiffs to show the character of their title, it must be equally unnecessary to show how they derived it, and that, *ex. gr.* they could be indorsees because the note was payable to a party who had a right to indorse it. The defendant has distinct notice of the cause of action on which the plaintiffs assert their right to recover. We refer also to *Warmesley v. Macey* (2 B. & B. 338), *Lamb v. Newcomb* (*Id.* 343), and *Elstone v. Mortlake* (1 Chit. 648).

As to the second ground, we have the defendant's own affidavit that at the time of his arrest he had not, nor had he at the time of making his affidavit, any intention of quitting Canada with intent to defraud the plaintiffs, or any of them, of their said debt. His affidavit was sworn on the 27th of August 1866. When he made this affidavit he had the opportunity of knowing and must be assumed to have known what the affidavit of debt, sworn on the 26th of June last, and the affidavit of the plaintiffs' attorney, sworn on the 3rd of July last, contained. He knew, therefore, that it was asserted that when he bought the goods from the plaintiffs he said he was worth about \$4000, and was about to commence business in Cincinnati; that he had never opened out his goods there; that he had shipped boxes from Cincinnati, and entered them at the custom-house at Windsor, in this province; that on the 26th of June last he told one of the plaintiffs he had sold the goods purchased from them, and had the proceeds, with his other moneys, invested in securities, but refused in any way to pay or secure the

promissory notes, and told one of the plaintiffs that if he took proceedings he might not find defendant there (*i.e.* at London, in Upper Canada), where this conversation took place.

He does not deny any of the foregoing statements, nor even attempt to palliate or explain them.

We are of opinion that the facts and circumstances are sufficient to establish that there was and is good and probable cause for believing that he, unless for his arrest and unless he had been arrested, would have quitted Canada with intent to defraud the plaintiffs; and therefore that this rule should be discharged, with costs, as to this last ground. As to the first, we think, upon the authorities to which we have referred, the objections fail, though there were earlier cases which would have justified a contrary conclusion.

Rule discharged.

SCRATCH *v.* JACKSON.

Dower—Pleading—Practice.

The defendant in dower having allowed judgment to go by default, the court, under the circumstances of this case, refused to allow him to plead a release by defendant, or a denial that the husband died seized, as alleged in the plaint.

Held, however, that such allegation was not admitted by defendant not pleading, for it was an averment not material to the right of action, and must be proved, if required to establish a claim to damages.

DOWER, brought by the demandant as widow of John Jackson, deceased. The count stated that she claimed the third part of the lands mentioned "as the dower of the said Isabella Scratch of the endowment of John Jackson, deceased, heretofore her husband, who died seized of the said lands, whereof she hath nothing;" and she claimed damages for the detention of her endowment from the death of her said husband.

The tenant allowed judgment to go by default, and the demandant signed judgment of seizin and for her damages and costs, and entered the case for the assessment of damages in the usual manner at the assizes at Peterborough, in April last, before *Hagarty, J.*, where she got a verdict for £50,

being for six years' damages at the rate of £8, 6s. 8d. per annum.

She proved that her husband had been dead about thirteen years, and the annual value of the land, and the service of the notice of action as required by statute demanding her dower.

The defendant offered to prove a deed, in order to show that the husband did not die seized. The learned judge refused to receive the evidence; he also refused to allow a plea denying the seizin to be now put on the record unless the demandant's counsel would consent.

In Easter term *J. A. Boyd* obtained a rule calling on the demandant to show cause why the interlocutory judgment and the assessment of damages should not be set aside upon terms, and the defendant be allowed to plead a release by the plaintiff of her dower, and in denial of the plaintiff's right to damages, on affidavit, suggesting that the defendant was prevented from pleading by the conduct of the demandant's attorney, and on merits disclosed; or why the assessment of damages should not be set aside, or the damages be reduced to one shilling, on the ground of the tender of evidence that her husband had aliened the premises and did not die seized thereof, and because no evidence was given by the demandant that her husband died seized (the averment in the plaint not dispensing with such proof).

Walker v. Boulton, 6 O. S. 553; *Cadman v. Strong*, 10 U. C. R. 591; *Huffman v. Askin*, 2 C. P. 423; *Bishoprick v. Pearce*, 12 U. C. R. 308; *Ryckman v. Ryckman*, 15 U. C. R. 266; *Cook v. Philips*, 23 U. C. R. 73; Ch. Plg. vol. ii. p. 577, were cited in support of the rule.

The affidavit of the defendant admitted that he had been served with a demand of dower, as well as with the declaration and demand of plea, but excused his paying no attention to it because he had a deed dated the 13th of July 1831, executed by the demandant's husband, conveying these premises to himself (in consideration as expressed of £50), and also executed by the demandant for the purpose of releasing her dower; that in April 1865 a similar

demand had been made on his (defendant's) son, to whom he had made a deed, taking back a mortgage, and no proceeding to recover dower had followed. It was further stated that on the 7th of April he was served with a notice of assessment, and on the 9th he consulted his attorney, and an abortive negotiation for leave to plead that demandant's husband did not die seized was commenced. There was an affidavit from the defendant's attorney, which showed, as to the negotiation, that the deed of the 13th July 1831 was exhibited to the plaintiff's attorney; that it contained no release of dower; that there was no certificate of examination; and that demandant's mark was to it, opposite a seal. The deed was produced on the argument, and demandant's name appeared thus, "Isabella + Jackson" [L.S.]. It may be added that the ink in which this name was written differed very much in colour from that in which her husband's name and the names of the two subscribing witnesses were written. The demandant's name was not in the body of the deed at all, nor was there any reference to her or her dower.

Hector Cameron, on showing cause, filed an affidavit of the demandant, swearing that her late husband, John Jackson, died in December 1852; that in March 1828 he got the patent for this land; that on the 25th of July 1834 he conveyed the land to his father, Ephraim Jackson, and the deed was registered on the 24th of September following; that Ephraim died twelve or thirteen years afterwards, leaving demandant's husband, his eldest son and heir-at-law, him surviving. She denied being a party to or executing the deed set up by the defendant, and she swore she did not believe any such deed ever was made; that her late husband, Jackson, never did, to her knowledge, execute any deed to William Jackson; that Ephraim Jackson held and occupied the land up to the time of his death, and the defendant resided in the locality and knew all the facts, and was a subscribing witness to the deed and to the execution of the memorial thereof for registry, and did not claim then, or at any time afterwards, or pretend to have a deed of the land to himself, but spoke of the lands as belonging to her said

late husband. She swore she never heard of the deed now set up by the defendant till after the commencement of this suit. He also filed the affidavit of the demandant's attorney, repelling any charge of bad faith on his part in proceeding to assess the damages. It appeared by the demandant's affidavit, and that of another person, that one of the two persons whose names were written as the subscribing witnesses was living, and had denied all recollection of having witnessed the deed set up by the defendant. He was sworn to live twenty or thirty miles from Peterborough. There was no affidavit from him.

DRAPER, C.J., delivered the judgment of the court.

We think the defendant has himself to thank for the consequences of not having pleaded in due time, and does not establish a case against the conduct of the demandant's attorney to entitle him to any relief as of right. The application must therefore be disposed of on the other grounds suggested.

First, as to setting aside the interlocutory judgment and allowing the defendant to plead a release by the demandant. This rests upon the deed of the 13th of July 1831; and as to this branch of the application it is sufficient to say that the demandant is not a party to the deed; it contains no release of dower; and though one of the subscribing witnesses to it is sworn to live within about thirty miles from Peterborough, there is no affidavit from him to show that the demandant executed it in his presence; it purports only to bear her mark. She unequivocally denies having executed any such deed. We think no ground therefore exists for allowing this plea.

Then as to a plea denying that the husband died seized, which is asked for to meet the claim of damages for detention of dower. The verdict in this respect, if allowed to stand, finally disposes of this part of the claim, for she cannot recover any further damages. The amount does not appear unreasonable if the right exists. Considering defendant's neglect to defend, he must clearly satisfy the court that the claim is wholly unfounded, and the proposed plea true,

before this relief could be properly granted. And it appears to me that without the deed of July 1831 the defendant could not succeed, and that to sustain his case by that deed he should have advanced it as part of the ground of his application, sustained by the affidavit of one of the subscribing witnesses. It may be doubtful whether the second paragraph of his affidavit is a direct affirmance of the execution of this deed, though it purports to be a conveyance to himself. He swears that he treated the proceedings as an attempt to extort money, "I having in my possession a deed bearing date the 13th of July 1831, from the said demandant's husband, conveying to me the said premises, duly executed by the said demandant's husband, and by the said demandant herself, for the purpose of releasing her dower in the said premises, which deed was attested by two subscribing witnesses." But I think he meant to assert the execution of the deed as a fact within his own knowledge. But then comes the clear proof on the other side, that in 1834 the demandant's husband executed a deed of the same land to his father, to which deed the defendant was a subscribing witness; that the possession of the land went according to this latter deed (which was registered) until the father's death, twelve or thirteen years afterwards. If the land passed by this deed, as it apparently did, unless the deed of 1831 is established, then the demandant's husband, as eldest son and heir-at-law, became entitled on his father's death, and died so entitled for all that appears, and if so this defence to the damages would fail unless the deed of 1831 passed the estate. In this view, and on examining all the papers, we do not think the defendant's application should be granted. He wilfully let the opportunity go by when he might have defended the action, and has no claim as regards the damages for indulgence, which he could only get on payment of costs.

There remain only the legal objections, of the refusal to receive evidence, by proof of the deed of 1831, that the demandant's husband did not die seized, and of the absence of affirmative evidence on her part that he did. There is but one question, and that is whether the assertion that the

demandant's husband died seized is admitted by the defendant's not pleading to the declaration, but letting judgment go by default. Mr. Boyd insisted that this assertion had no greater or other effect than a suggestion entered after judgment by default, and that a suggestion must be proved.

It seems well settled that if there be an issue affecting the demandant's right to dower, and the jury find it in her favour, they should also find—1st, That her husband died seized, and of what estate, and the time of his death. 2nd, The annual value of the land. 3rd, They should assess damages for the detention; and, 4th, the costs. This was done in *Dennis v. Dennis* (2 Wms. Saund. 328). In that case the count did not state that the husband died seized, and the *venire* was in the common form. The *postea* showed a finding on all these four points, and the demandant had judgment to recover seizin and the mesne profits and costs. If the jury omit to find upon all or any of these matters, a writ of inquiry may be sued out. (See 2 Wms. Saund. 43.)

The marginal note to *Jones v. Jones* (2 C. & J. 601) states that it must be alleged and proved that the husband died seized of an estate of inheritance to entitle the widow to damages. The judgment was for the demandant to recover seizin of a third, and she suggested that her husband died seized in fee, and issued a writ of inquiry, on which the jury found that the husband died on, etc., having during his intermarriage been seized in his demesne as of fee-simple of the tenements aforesaid, and they assessed damages and costs, for which she had judgment. But the court held that on this finding she was not entitled to damages, because it did not appear that her husband died seized.

In our case there is no issue joined; it was an assessment after judgment by default. If the averment that the husband died seized be material, one on which the defendant could properly take issue, he must, upon the well-known rule, be taken to have admitted it by his default (Taylor on Evidence, sec. 748).

We are, however, of opinion it was not material within the meaning of the rule. The count would have been good

without it. The primary object of the suit was to establish the demandant's right to dower, and provided her husband was seized of the land during coverture it was immaterial whether he died seized or no. If the defendant had directly traversed the averment, it would have created no bar to the demandant's claim for dower stated in the count, and he would therefore have tendered an immaterial issue. If so, his not noticing it is no admission of its truth; and if for the recovery of damages, which the count does not claim, it became necessary to establish the facts, proper evidence should have been adduced, but none was given. There was an affirmative to be established by the demandant to bring her case within the statute of Merton; and no proof having been given, we agree with the learned judge's rejection of evidence tendered to prove the negative.

Upon the whole, we think the rule should be made absolute to reduce the damages to one shilling, unless the demandant within ten days notifies the defendant that she elects that the assessment be wholly set aside, in which case the rule will be absolute to set aside the assessment, in either event without costs. The demandant will retain her judgment of seizin, and, as I understand the practice, she may give another notice of assessment, which our law substitutes for a writ to the sheriff to inquire.

LEE ET AL. v. MORROW.

Sale of land—Title—Mortgages—Power of attorney.

In an action by vendor against vendee on an agreement to purchase land, the question was whether the vendor had a good title. It appeared that there were two mortgages upon the land, both paid; of the one an entry of discharge had been duly made in the Registry office, of the other a certificate of discharge had been signed, but not recorded. *Held*, that from the entry by the Registrar the certificate of discharge, which was not produced, must be assumed to have been in proper form, and as such entry had by the statute the force of a reconveyance the first mortgage could form no objection; but, 2, that as to the second mortgage, though it was paid, the legal estate remained in the mortgagee, and the plaintiffs therefore could not succeed.

The discharge of the first mortgage was executed under a power which, after authorizing the attorney to sell the principal's lands and give receipts for the consideration money, gave power upon payment of all or any debts to give proper and sufficient acquittances and discharges for the same. *Held*, sufficient authority to sign the statutory certificate.

THE declaration stated that the plaintiffs sold to defendant by auction certain lots of land and premises, and that defendant purchased the same for \$3000, of which \$750 were to be paid on production of abstract of title showing a good title in the plaintiffs, and \$2250 to be secured on the land by mortgage to the plaintiffs, to be a first charge thereon, with interest at ten per cent., payable quarterly; that defendant paid the plaintiffs \$750, and all conditions were fulfilled, etc., necessary to entitle plaintiffs to maintain this action. *Breach*, that defendant has not executed a mortgage to secure the said sum of \$2250 with interest; and four quarters of the interest, amounting to \$225, were due before the commencement of this action, and remain unpaid.

The defendant pleaded, 1st, That the plaintiffs had not, at the time of the alleged breach, a good title to the said lands; 2nd, That the plaintiffs were not ready and willing to grant and convey to the defendant the said lands, according to the terms of the agreement.

The case was tried at the winter assizes for the United Counties of York and Peel, before *Morrison, J.*

The plaintiff put in letters patent from the Crown, granting lots numbers 12, 10, and 11 on the north side of M'Donald Street, and 10, 11, and 12 on the south side of London Street, in the town of Peterborough, to Wilson S. Conger, and also letters patent from the Crown, granting lots number 13 on the south side of M'Donald Street, and number 13 on the south side of London Street, in the town of Peterborough, to James Gifford Cowell. The last will of the said James G. Cowell was also proved (by an admission), bearing date 25th December 1837, whereby he left and bequeathed to his wife, Mary Letitia, all and everything he died possessed of, both real and personal, after his funeral expenses and just debts were paid.

A deed was also admitted, made by Mary Letitia Cowell to Wilson S. Conger, and also a mortgage from the said W. S. Conger to the plaintiffs in this action, for the lands mentioned in the agreement of sale set out in the declaration. The memorandum in writing of the agreement was

also put in, dated apparently in November 1864, as stated in the declaration. It was also admitted that deeds of the same lands were executed by the plaintiffs to the defendant, and were tendered to him for acceptance. The mortgage from Conger to the plaintiffs contained a power of sale in the ordinary form.

On the defence it was objected that the plaintiffs had not shown sufficient title, or that they had a right to sell under the power of sale contained in the mortgage. The learned judge overruled the objection, reserving leave to the defendant to move to enter a nonsuit.

It was then admitted that Conger, in 1843, mortgaged part of the premises to Mrs. Cowell; that there was an entry of a discharge of that mortgage made in the Registry Office on the 11th of May 1860, but this discharge was made under a power of attorney, which was also proved (admitted on production of certified copy from the Registry Office), dated 21st August 1843, whereby Mary Letitia Cowell, widow and executrix and sole devisee named in the will of James Gifford Cowell, deceased, appointed George Frederick Orde, of the town of Peterborough, Esquire, her attorney, to enter into and upon the houses, messuages, farms, lands, and hereditaments to her belonging, in her own right, or as widow, executrix, or devisee, as aforesaid, and to make sale and absolutely dispose of the same, or convey in exchange for other houses, messuages, farms, lands, or hereditaments, and the moneys arising from any such sale, or on account of any exchange, to lay out and invest in other lands or hereditaments, or otherwise, as he shall think fit; and to sign, seal, and execute, and as the act and deed of the said Mary Letitia Cowell, to deliver any deed or deeds, conveyances or assurances, as shall be necessary or expedient for any of the purposes aforesaid; and to sign, give, and execute all receipts, "discharges, and acquittances as shall and may be necessary for any consideration moneys to be paid on any such sales or exchanges, and may have been placed out on such securities; and also upon payment, receipt, or recovery of all or any debts, dues, sum or sums of money for her, the said Mary Letitia Cowell, and due

to her, the said Mary Letitia Cowell, in her name to give proper and sufficient acquittances and discharges for the same."

It was admitted that the mortgage money was paid in full, but objected that the power of attorney did not authorize the discharge. It was also admitted by the plaintiffs' counsel that Conger mortgaged another part of the premises to Messrs. Wallis and Langton, and it was agreed on both sides that this encumbrance was after default paid, and a discharge for registration executed, but never entered on the registry-book.

It was further admitted that on the 5th of September 1860 Conger executed a conveyance in fee to John A. D. Vickers of one-sixth of an acre, being composed of part of Lot No. 11, north of M'Donald Street, and west of George Street (described), which conveyance was voluntary for a nominal consideration, and that no notice of the sale made under the power of sale contained in Conger's mortgage to the plaintiff was given to Vickers or any one on his behalf.

Mr. Weller was called, and proved that he acted as solicitor for the defendant; that he paid the \$750 for defendant when the deeds put in evidence were shown to him, but no abstract of title was delivered to him; that he was aware of the mortgages to Mrs. Cowell and to Wallis and Langton; and that the former was discharged as proved, and that he was told that the mortgage money due to Wallis and Langton had been paid; that it was at the time of the payment of the \$750 understood between him and the plaintiffs' solicitor that there was no waiver by defendant as to the goodness of plaintiffs' title; that the agreement for the sale to defendant had been previously executed, and that he objected to the title as it then appeared, and signed a memorandum (put in), dated 21st December 1864; that the mortgage was to be signed by defendant, and registered on his (the witness) being furnished with, 1st, a copy of a power of attorney from plaintiffs to Hon. J. H. Cameron; 2nd, a copy of clause in settlement authorizing the appointment of attorney. (NOTE.—No explanation appeared as to what settlement was referred to); 3rd, discharge of mortgage to Wallis and

Langton; 4th, power of attorney, Mrs. Cowell to Orde. Mr. Weller further said that the discharge of the mortgage to Wallis and Langton had never been produced to him, and that he made the payment without prejudice as to whatever abstract and title the purchaser was entitled to as his right; that he had bought Conger's equity of redemption in all the premises sold to defendant at sheriff's sale after 1860 and before the sale to defendant; that on the 22nd of September 1864 a notice of sale (under the power in the mortgage) was served on him; that he had the opportunity of perusing all the deeds produced here to-day. A letter written by the witness to Hon. J. H. Cameron was put in. It referred to Vickers' title and the deed to him. It bore date 20th March 1865.

Defendant's counsel then again applied to plead a denial of the delivery of any abstract of title. The learned judge refused. He also applied to plead no notice to Vickers of the intended sale under the power in the mortgage, to which the plaintiffs objected, as they would require time to reply. It was then agreed, on the defendant's admitting that a judgment was recovered and execution issued, under which Conger's equity of redemption above mentioned was sold to Mr. Weller, and that the debt for which that judgment was recovered was due by Conger before he conveyed to Vickers, that the defendant should have leave to apply to the full court to add a plea, the plaintiff replying, as if it had been done at the assizes, if the court should be of opinion that the evidence was not admissible under the present pleadings. It was also admitted by the defendant that no objection was taken to the title on account of the deed to Vickers until the letter of the 20th March 1865, and that the plaintiffs had no actual notice of that deed until the receipt of that letter other than what in law the registry of that deed would give.

A verdict was entered for the plaintiffs for \$2537, 50c., with leave to defendant to move to enter a nonsuit, or a verdict for defendant, if the court should be of opinion upon the whole case that the plaintiffs were not entitled to succeed, or to reduce the verdict to such an amount as they might direct.

In Hilary term *C. S. Patterson* obtained a rule calling upon the plaintiffs to show cause why a verdict should not be entered for the defendant, pursuant to leave reserved, on the grounds that the absence of any registered discharge of the mortgage Conger to Wallis and Langton, or release or reconveyance, and the insufficiency of the power of attorney from Cowell to Orde, were defects in the title of the plaintiffs, and that the plaintiffs could not convey an indefeasible title under the power under which they sold without notice to Vickers; or why the verdict should not be reduced to nominal damages, or to such amount as the court should think proper; and why the defendant should not have leave, if necessary, to add a plea denying the delivery of an abstract showing a good title in the plaintiff. He cited *Sharland v. Leifchild*, 4 C. B. 529; *Blackburn v. Smith*, 2 Ex. 783; *Jeakes v. White*, 6 Ex. 873; *Simmons v. Hessel-tine*, 5 C. B. N. S. 554; *Boyman v. Gutch*, 7 Bing. 379; *Souter v. Drake*, 5 B. & Ad. 992; *Flureau v. Thornhill*, 2 W. Bl. 1078; *McNaghten's Select Cases*, 65; *Shepherd v. Keatley*, 4 Tyr. 571; *Smith v. Garland*, 2 Mer. 123; *Deverell v. Lord Bolton*, 18 Ves. 510; *Major v. Ward*, 5 Hare, 598; *Webb v. Austin*, 7 M. & G. 701; *Ferry v. Williams*, 8 Taunt. 62; *Sug. V. & P.* 14th ed. 427; *Souter v. Drake*, 5 B. & Ad. 992.

J. H. Cameron, Q.C., showed cause, citing Lee on Abstracts of Title, 9; *Boyman v. Gutch*, 7 Bing. 392; *Willett v. Clarke*, 10 Price, 207; *Kennedy v. Solomon*, 14 U. C. R. 623; *Townsend v. Champernown*, 1 Y. & J. 449; *Cattell v. Corrall*, 4 Y. & C. 229; *Avarne v. Brown*, 14 Sim. 303; *Sug. V. & P.* 14th ed. 353.

DRAPER, C.J., delivered the judgment of the Court.

The first question is whether, under the facts proved or admitted, either of the two mortgages constitute an objection to the title of the plaintiffs as conveyed to the defendant, so as to be an answer to this action.

One of these mortgages was made by Conger to Mrs. Cowell; the other, and this is the first in point of date of execution, was made by Conger to Wallis and Langton.

That to Mrs. Cowell has been paid; and, as we gather from the evidence and the admissions of counsel on the argument, the payment was made to Mr. Orde, who received it as attorney for Mrs. Cowell under the power of attorney put in at the trial. An entry has been made in due form in the registry office that this mortgage has been discharged. This must have been done on the production of a certificate, that the mortgagor had satisfied the money due upon the mortgage. We infer this certificate was signed by Mr. Orde as Mrs. Cowell's attorney.

But it is objected that the power of attorney did not authorize Mr. Orde to sign this certificate, or, as the objection was stated in argument, "to reconvey" the mortgaged lands. It is the Registry Act which makes every certificate of payment (whether made before or after the time named in the mortgage), when registered and entered as the Act requires, valid and effectual in law as a release of the mortgage, and as a conveyance to the mortgagor of his original estate. The statutory certificate in itself, and taken alone, is only evidence of payment. It contains no words releasing the mortgagor from his covenants, nor conveying the lands to him; its force in these particulars is derived from its entry and registration in accordance with the Act. Now the power of attorney concludes with these words: "Upon payment, receipt, and recovery of all or any *debts*, dues, sum or sums of money for her, the said Mary Letitia Cowell, and due to her, the said Mary Letitia Cowell, in her name to give proper and sufficient acquittances and discharges for the same." In a previous part of the power of attorney Mr. Orde was authorized to sell Mrs. Cowell's lands, to execute deeds, and to sign, give, and execute all receipts, discharges, and acquittances for the consideration money of any such sales, and therefore the last part must fairly be held to extend to something not previously provided for, and the words used are large enough to include debts due and secured by mortgage. Mr. Orde had therefore, in our opinion, power to receive this debt and to give a proper and sufficient acquittance and discharge for it; and the certificate is to be presumed to have been in accordance

with the statute (there is no evidence before us of its actual contents), or it would not have been entered by the Registrar, and it will in that case state only that Conger has satisfied all money due upon the mortgage to Mrs. Cowell. In our opinion Mr. Orde was empowered to sign such a certificate as a proper and sufficient acquittance for the payment; for this purpose no deed was necessary. It was Conger's affair to get it entered by the registrar according to the Act; and this act of the officer, under the unequivocal language of the enactment, gave to this certificate the additional though unexpressed force and effect of a conveyance of this land. As to this mortgage, and upon this ground, we think the plaintiffs' title clear of difficulty.

The second mortgage has also been paid, and a similar certificate of the payment was duly signed and made by the mortgagees, but it has never been entered in the registry office. The mortgage is therefore satisfied, but the legal estate remains in the mortgagees; and the cases cited in argument, of which it is sufficient to refer to *Townsend v. Champernown* and *Avarne v. Brown*, show that in equity the objection on this account is treated as a matter of conveyance and not of title.

But this is an action at law on the agreement to purchase, and the breach assigned is the not giving a mortgage to secure the unpaid balance of the purchase-money, with interest, upon land which the plaintiffs contract to sell and the defendant to buy. The plaintiffs have tendered a conveyance of the lands, and they have got a verdict for the principal money, which, according to the agreement, was not due for five years, and for interest from the date thereof. If this verdict is sustained, the defendant can only claim the conveyance already tendered to him, and must rely on the plaintiffs' covenant therein for indemnity (we mean of course at law), though the legal estate is outstanding in the mortgagees, notwithstanding they may have made and signed a certificate of the payment of the money due, which being unregistered does not operate as a release or conveyance, and which is not, any more than the mortgage, in the defendant's possession or under his control.

Now, we apprehend that if the plaintiffs had filed a bill to compel specific performance by the defendant, it would have been incumbent on them to procure either a conveyance of the legal estate from Wallis and Langton, or, if a certificate of the payment of the mortgage money had been signed, to have had it entered and registered according to the Act. We do not see how they can stand upon a better footing in a court of law. For though a good title can be made and conveyed, yet as long as the legal estate is outstanding, though a mere dry estate, the plaintiffs cannot be truly said to have fulfilled their part of the contract, and cannot therefore as yet call upon the defendant to fulfil his.

The same question arises as if the defendant were suing at law to recover back his deposit, or first payment; and according to *Bowman v. Gutch* (7 Bing. 379), the court will not consider whether the title is such as a court of equity would compel an unwilling purchaser to take, but simply whether the vendor had a good title or not.

The Court of Exchequer have gone further in *Jeakes v. White* (6 Ex. 873), holding that a good title meant such a title as the Court of Chancery would hold sufficient to compel specific performance, and as would be a good answer to an action of ejectment by a claimant; and in *Simmons v. Heseltine* (5 C. B. N. S. 554), the court held that if the ability of the vendor to make a good title depends on a doubtful question of fact or law, the title will not be considered good as between vendor and purchaser. And in *Stevens v. Austen* (7 Jur. N. S. 873), *Blackburn, J.*, says, "I used to think that a court of law, in a case like the present" (an action by the purchaser to recover back his deposit), "was bound to decide absolutely whether the title was good or bad."

In most of the cases at law the purchaser has been the plaintiff seeking to recover back his deposit; but where the vendor seeks to compel the vendee to accept a conveyance and to pay the purchase-money the proceedings are in Chancery, and considering the points in difference between the parties in this cause that would appear to be the better course. The plaintiffs' contract is to convey an estate in

fee-simple, and in this court that means the legal estate absolutely, but they have in fact only conveyed an equitable fee-simple, leaving the defendant to get done what may be a very easy matter or may not, according to the circumstances—*i.e.* to get a mortgage which is paid properly discharged, so as to pass the legal estate from the mortgagee to himself. They found their claim upon the necessary assertion that they have fulfilled their part of the agreement, and are therefore entitled to recover damages, because the defendant refuses to fulfil his, but in our opinion they have failed in proving performance on their own part, and cannot therefore sustain their claim.

The case of *Wynne v. Griffith* (1 Russ. 283) shows that where the legal fee is outstanding (which in that case was long before vested in parties who would have become trustees for the vendor), and the abstract does not show in whom that fee is, the objection is matter of title, and not merely of conveyance. Here, possibly, the legal fee may still remain in Wallis and Langton, if both are living, or the facts may be such that the objection is one of conveyance; but in either case it is not removed, and therefore the plaintiffs are not entitled to succeed.

MASSACHUSETTS HOSPITAL v. THE PROVINCIAL INSURANCE COMPANY.

Covenant to pay in N. Y.—Depreciation of currency.

Defendants in Toronto covenanted to pay \$516 in New York on the 20th August 1858, which they failed to do, and when sued here in 1865 they claimed to pay in American currency at par, though in the meantime it had become very much depreciated. *Held*, however, that the plaintiffs were entitled to the equivalent of the \$516 at New York on the day of payment, with interest.

DECLARATION on a covenant, dated 21st June 1858, to pay \$516, 89c., sixty days after date, at the Bank of the Republic, New York. Breach, non-payment.

Plea, that on the day when said money was payable defendants provided funds, and had the same to meet this claim at the Bank of the Republic, but said deed was not then

there, nor was it presented there on the day it became due, nor were the plaintiffs there to receive it, nor was any claim made on defendants till the 10th of November 1865; that the money is payable in New York in American currency, and defendants are and have been always ready to pay in lawful United States currency, and before action tendered the same to the plaintiffs in such lawful currency, which the plaintiffs would not accept, and on the day of tender the amount in United States currency was worth \$212, 38c. in Canada currency, and which last sum is paid into court. Issue.

At the trial, at Toronto, before *Draper, C.J.*, a statement of facts was put in by consent, as follows:—

The covenant being, as alleged, in form a promissory note under the seal of the defendants, payable at the Bank of the Republic, New York, was presented for payment on the 20th of June; but the defendants treated it as a promissory note, and allowing three days' grace, went to the place of payment and tendered the full amount, but neither the covenant nor any one authorized to receive payment was there. This was three days after it was due. Shortly after defendants wrote to plaintiffs, asking them to present the covenant to their named New York agents for payment. Soon after the funds held by their agents for payment were returned to defendants in Toronto.

Some weeks after this deed of covenant was presented at the New York agents by plaintiffs for payment, but it was not paid, and on the same day the plaintiffs also demanded payment at the Bank of the Republic, but without success.

Some years afterwards, in November 1863, some correspondence took place between defendants and a person claiming to be the assignee of this claim. In October 1864 the assignees wrote to defendants demanding payment, but no answer was sent. In November following it was placed in a Toronto solicitor's hands for collection. On the 10th of the same month defendants' attorney tendered to the plaintiffs' attorney \$518 in United States currency, reckoned at par, which was declined.

It was further admitted that the covenant was made in Toronto, where defendants then and now are domiciled, and

that on the day it became due it was not presented at the Bank of the Republic, nor had defendants any funds there to pay it.

On these facts the learned Chief Justice ruled that the plaintiffs were entitled to recover the full amount claimed, viz. \$757, including interest, and for this the plaintiffs had a verdict.

In Easter term, *Burns*, for defendants, obtained a rule to set aside or to reduce the verdict, the damages being excessive, or why at least it should not be reduced by the amount paid into court.

During this term *S. Richards, Q.C.*, showed cause, citing *Judson v. Griffin*, 13 C. P. 350; *White v. Baker*, 15 C. P. 293.

Burns supported the rule, and cited *Jones v. Arthur*, 8 Dowl. 442; *Stor. Confl. L. secs. 313 b. 318*; *Jones v. Arthur*, 4 Jur. 859; *Cooch v. Maltby*, 23 L. J. Q. B. 305.

HAGARTY, J., delivered the judgment of the court.

We do not see anything in this case to take it out of the operation of the ordinary rule, that the plaintiffs should recover such damages as will put them in the same situation as if the contract had been duly performed. The defendants were bound to have paid the plaintiffs on the 20th of August 1858; no valid excuse for their not having done so has been offered. At all events, as they did not attend to pay the money at the place named on the proper day, it was their duty to find the plaintiffs and pay them. We therefore think that the plaintiffs are entitled on the face of the contract to an amount equivalent to the value of the sum at the place of payment on the 20th of August 1858, besides interest from that date. We understand the parties to admit that at that time the dollar in New York and in Toronto was of the same value.

Assuming, as we do, that the delay in payment was the fault of the defendants, we cannot understand why the plaintiffs are now to lose one-third of their claim because their own currency has become depreciated in value. The

defendants, on the other hand, have only to pay what they originally contracted to pay, viz. the same amount (apart from interest), which on the 20th of August 1858 would have satisfied their covenant. The point seems expressly decided by our Court of Common Pleas in *White v. Baker* (15 C. P. 293). The damages should be reckoned with reference to the time fixed for payment.

As to reducing the verdict by the amount paid into court, this is a mere formal matter, as it is conceded that defendants are of course entitled to credit for that sum. The plaintiffs have taken issue on defendants' plea, thereby denying the fact of the payment into Court. As, however, the defendants have raised other questions by the rule, we think the proper course is to direct the verdict to be reduced by the amount paid into court, neither party to have the costs of the motion or argument in term.

Rule accordingly.

FISHER *v.* JOHNSTON.

Ejectment—Attornment after action—Costs.

In ejectment it appeared that the plaintiff had recovered judgment in dower against defendant's landlord, who had submitted to the claim, and that defendant, after this action, had attorned to the plaintiff and paid rent to her attorney. There had been also a demand of possession. *Held*, that the plaintiff was entitled to a verdict and judgment for costs, but not to a writ of possession.

WRIT of summons in ejectment issued 21st January 1864 for a described portion of town lot number 20, on the west side of Church Street, in Belleville.

On the 11th February 1864 the defendant entered an appearance, and defended for the whole of the premises claimed.

The case was tried in March 1866, at Belleville, before *Hagarty, J.*

A demand of possession was served on behalf of demandant on the 20th of January 1864.

The plaintiff claimed title as dowress, and by virtue of a writ of seizin in a cause wherein she was demandant, and the Commercial Bank of Canada were tenants, and under

which writ seizin was delivered to her by the sheriff of the premises claimed.

An exemplification was put in of a judgment recovered in the Court of Common Pleas, in an action in which the plaintiff was demandant and the Commercial Bank was tenant, and demanded dower in town lots numbers 19 and 20, in the town of Belleville. The tenant made default, and the demandant had judgment for her dower in the said land, and \$31, 62c. costs. The judgment was entered on the 31st of December 1863.

On the 5th of January 1864 the demandant sued out a writ to the Sheriff of Hastings, commanding him to deliver to demandant seizin of the third part of the said land, with the appurtenances, to hold to her in severalty by metes and bounds, and also to levy the costs; to which, on the 20th of January 1864, the sheriff returned that he had caused the within-mentioned property to be set apart as directed, and had levied the costs.

The evidence showed that the defendant was in possession under one Holden when this action was brought; that Holden claimed to be a purchaser from the Commercial Bank, but had not obtained his title-deed.

The plaintiff's attorney proved that the writ of seizin, which was produced, was delivered to the sheriff; that he (the attorney) went on the premises with the sheriff, who had a plan of the premises, and the sheriff gave him seizin by digging up some of the earth and placing it in his hand. This was on the one-third of those premises, and the defendant resided on this third. This took place on the 20th of January 1864.

The plaintiff in like manner proved a recovery in dower against Holden for the same premises, on which a writ of seizin was sued out. There was also a writ of seizin against the Commercial Bank. Holden went with the demandant's attorney, and submitted to her claim, and his tenants attorned, and had since paid rent to the attorney of the plaintiff.

For the defence it was objected that the plaintiff showed no title—no right to maintain suit against defendant; that

the attorney having no written power of attorney to receive seizin, could not receive it for demandant; that the plaintiff was shown to be now in possession through the defendant, who attorned to her as tenant.

It was admitted that the plaintiff's late husband died in 1858, and the new Dower Act was only passed in 1861, and therefore that seizin should have been delivered according to the former law.

The learned judge inclining against the plaintiff's right, a verdict was rendered for the defendant, with leave to the plaintiff to move to enter a verdict for her, if the court should think, on these facts, she was entitled to recover.

In Easter term *Jellett* obtained a rule calling upon the defendant to show cause why there should not be a new trial or a verdict entered for the plaintiff on leave reserved, and for misdirection; that the learned judge should not have told the jury that the plaintiff could not succeed in this action, she having since the commencement of this suit obtained possession of the premises from the defendant; and for telling the jury that the Act of 1861 governed this case, and that seizin was not properly rendered; and for telling the jury that the plaintiff's attorney had not sufficient authority to receive seizin.

John Bell (of Belleville) showed cause, citing *Keene dem. Angel v. Angel*, 6 T. R. 470; *Doe dem. Feldon v. Roe*, 8 T. R. 645; *Doe dem. Lawson v. Law*, 8 T. R. 646; *Cole on Ejectment*, p. 17.

DRAPER, C.J., delivered the judgment of the court.

It is plain that the tenant having attorned to the plaintiff since this action was brought, and having since paid rent to her attorney for her, does not deny her title; and this action has been continued by the plaintiff, and defended by the defendant, the one to recover the other to escape the costs which preceded the attornment, for if they had been settled then the action must have ceased.

The very fact of attorning shows that the plaintiff had a right to recover; the payment of rent since confirms it;

that she recovered dower in this land against the landlord of this defendant, who (the landlord) submitted to her title after this action was brought, was also proved; and it further appears there was a demand of possession.

The writ of seizin is not in the form settled under the Act of 1861, and it corresponds very nearly with that given in 3 Chit. Pleading 1323, 5th edition.

The cases cited by *Mr. Bell* refer to staying proceedings in an action of ejectment until the costs of a former ejectment have been paid.

This seems to me a stronger case in favour of the plaintiff than that provided for by the 22nd section of the Ejectment Act, where the claimant who had a title when the action was commenced, but which expired before the trial, is entitled to a verdict, and to judgment for costs. Here the defendant, by attorney, admits the plaintiff's title before trial. The action was therefore properly brought, and necessarily, for a defence denying the plaintiff's right to possession was entered. We think she ought to have a verdict and judgment for costs, but not a writ of possession, for she has disentitled herself to that by accepting the defendant as her tenant, and receiving rent from him. The defendant might have stayed the action after attorning and being accepted as tenant, on payment of costs, instead of which he appeared at the trial and raised an objection to the title of the very party to whom he had recently attorned.

IN THE MATTER OF M'LEAN AND THE CORPORATION OF THE TOWNSHIP OF BRUCE.

Temperance Act of 1864.

Upon the affidavits in this case, substantially stated below, the court refused to set aside a by-law passed under "The Temperance Act of 1864," on the ground that the reeve did not "preside" at the meeting at which it was adopted, but the clerk. There was no doubt that he opened and closed the poll, but the affidavits were contradictory as to the length of and reason for his absence in the meantime.

In Easter term *Robert A. Harrison* obtained a rule to quash by-law No. 29, for preventing the sale of intoxicating liquors in the township of Bruce, on three grounds: 1. That

no notice of holding the poll was posted up in at least four public places in the municipality. 2. That neither the reeve, nor any member of the council, nor any municipal elector, presided at the meeting for the purpose of receiving votes. 3. That the poll was closed at 3 p.m., before all the electors had polled their votes.

In this term *S. Richards, Q.C.*, showed cause.

The case turned entirely upon the affidavits filed on both sides, the contents of which are sufficiently stated in the judgment of the court, delivered by

HAGARTY, J.—We think the first and third objections are completely answered by the affidavits filed, both as to the giving the notices and as to the closing the poll.

The second, as to the reeve not presiding, has produced a large amount of testimony not completely reconcilable.

The witnesses for the relator swear that when they voted the reeve was not there. The witness M'Kay says that from half-past ten to half-past twelve he was engaged in business with the reeve "at some distance from the place where the poll was held." This statement may have several meanings, and it might be very difficult to assign a definite meaning on which perjury could be charged. If the reeve had noticed and explained this statement, there would have been nothing to argue. His omission so to do is the only point in the case requiring much consideration. If his affidavit stood alone in answer, we might be inclined not to accept it as sufficient. But the evidence is overwhelming that he duly opened and closed the poll, and a number of witnesses swear that, "except for a short time on two or three occasions when he was necessarily out of the room," he presided in the usual manner. It may be probable that the relator's witnesses when voting may have come in on these two or three occasions, and so not have seen him.

We must not too rigidly construe the statutable direction, that the reeve, etc., shall preside. In the case made out for the defendants, we cannot say that the clause in the Act was not substantially complied with. An over-strictness of construction would open the door to innumerable objections

of a technical character to almost every township meeting held by the ratepayers, who, generally without legal advice, are obliged to perform the many duties and go through the many forms prescribed by the Municipal Acts.

There seems no reason to suspect that there was any unfairness in the conduct of the voting, and we think, on the whole evidence before us, we must discharge the rule.

Rule discharged.

CAMPBELL v. COULTHARD.

C. S. U. C. ch. 19, secs. 151, 157—Division Court—Sale under executions.

Executions for about \$200, issued against the plaintiff from the first division court of the county, under which lumber was seized at his mill within that division. A sale was attempted there without success, and by direction of one of the execution creditors the bailiff had the lumber removed to the county town, thirty miles off, in the fifth division, which cost \$160. It was there bought by G., the deputy sheriff for \$160, and the defendant purchased from him. The plaintiff having brought trover, the jury were asked only to find the value of the lumber, which they assessed at \$288, and a verdict was entered for that sum.

Upon motion on leave reserved, a nonsuit was ordered; for though section 151 provides only for sale in the division where the goods have been seized, yet a sale in another division to a *bonâ fide* purchaser would pass the property, leaving the party injured to recover compensation from the bailiff; that G. must be assumed on the finding to be such a purchaser, and defendant could not be made liable for purchasing from him.

Quære, whether on the evidence, stated below, the jury might not have found that G. was in fact purchasing for defendant, who was a division court bailiff; and if so, under section 157 the sale would have been void.

Remarks upon the hardship of the case upon the plaintiff.

TROVER, for 66,792 feet of sawed lumber.

Pleas.—1. Not guilty. 2. Not plaintiff's property. 3. Leave and licence.

The case was tried at Lindsay, in April last, before *Hagarty, J.*

It appeared the plaintiff had a sawmill in the township of Eldon, and that three precepts or executions were delivered to one Hungerford, bailiff of the first division court, against the plaintiff's goods. The sawmill was within the limits of the first division court, and the judgments were recovered there. One Edwards was

the plaintiff on two writs, the joint amount of which was \$122, 6c. The defendant was the plaintiff in the other, which directed the levy of \$76, 11c. All three came to the bailiff's hands at one time. He seized a quantity of sawed lumber, not less than 64,000 feet, in June 1865, and advertised a sale at the plaintiff's mill, but could not get a bid, and adjourned the sale, and at a subsequent day tried again, but no one bid.

Then Edwards directed that the lumber should be removed to Lindsay, which was in the fifth division, and about thirty miles from the plaintiff's mill, and Hungerford employed a man to remove it, whose charge was \$160, and who was paid \$80 on account. There Hungerford sold it for \$160. The defendant was at the sale; only a few persons were present; and one James Gallon bought it, and he paid the \$80 for hauling it, which money he received from the defendant. Gallon was called, and swore that the defendant had nothing to do with his making the purchase, that he bought on speculation; only three persons were there. After the sale the defendant agreed to go shares with him in the profits, and lent him money to pay for it, and afterwards bought the whole. Gallon gave up the purchase to him for \$10. The defendant at that time was a division court bailiff in that county, and Gallon was a deputy sheriff. A witness for plaintiff swore that he went to the plaintiff's mill-yard to attend the bailiff's sale, and was willing to have given \$4 per thousand for the lumber. It was sworn it was worth \$5 or \$6 per thousand at the mill.

Hungerford swore that Edwards, one of the execution creditors, directed the removal of the lumber to Lindsay, and that the plaintiff said nothing as to moving it, but the man who drew it away swore that the plaintiff forbid him and Hungerford from taking it away; that he objected several times and said it ought to be sold on the place.

It was insisted for the plaintiff that the lumber could not be sold out of the division where it was seized; that the defendant could not buy at a division court sale; and that the sale was at so low a price as to afford evidence of a fraudulent and void sale.

For the defence it was objected that the sale to Gallon passed the property, and that neither property in the plaintiff nor a conversion by the defendant was proved.

The learned judge thought there was no evidence of fraud to vitiate the sale to Gallon, and asked the jury to assess the value of the lumber; and it was agreed that the verdict should be entered for the plaintiff for the amount assessed, with leave reserved to the defendant to move to enter a nonsuit.

In Easter term *C. S. Patterson* obtained a rule to show cause why a nonsuit should not be entered on the leave reserved, on the ground that the goods were lawfully sold, and that the defendant was not shown to have converted the goods, having done no act affecting them, and there having been no demand made upon him for them. He cited *Burroughes v. Bayne*, 5 H. & N. 296.

In this term *Hector Cameron* showed cause, citing *Carroll v. Lunn*, 7 C. P. 510; *Grainger v. Hill*, 4 Bing. N. C. 212; *Billiter v. Young*, 6 E. & B. 1 Add. on Torts, 271.

Consol. Stat. U. C. ch. 19, secs. 79, 135, 136, 155, 157, were also referred to.

DRAPER, C.J., delivered the judgment of the court.

The 157th section of the Division Courts' Act provides that no clerk or bailiff, or other officer of any division court, shall directly or indirectly purchase any goods or chattels at any sale made by any division court bailiff under execution, and every such purchase shall be absolutely void. If, therefore, the defendant was through Gallon indirectly the purchaser of the lumber in question at the sale by Hungerford, he acquired no title, and could not hold it against this plaintiff. Whether, looking at the whole case, he was not indirectly the purchaser, was not submitted to the jury, the case having been withdrawn from them by the consent of both parties, except as to the question of the value of the lumber, which they found to be \$288. Gallon denied that there was any understanding before sale between him and the defendant, though other parts of his testimony are cal-

culated to lead to an opposite conclusion; and if, on considering the whole together, the jury had adopted such conclusion, I am not at present prepared to say it must necessarily have been set aside.

The case seems to be one of cruel hardship upon the plaintiff. His property to the value, according to the verdict, of \$288, has been rightly taken in execution, but it has been removed from his mill-yard into another division of the county, and the mere expense of the removal (\$160) absorbs the whole sum for which it was sold. There is positive evidence that the plaintiff forbid its removal, and Hungerford, the bailiff who seized and removed, only asserts the direction of Edwards, an execution creditor, for the removal, adding that the plaintiff said nothing as to moving it, did not object to him. Thus the plaintiff's property, enough to satisfy the debts, amounting to less than \$200 (to which of course interest and costs should be added), for which it was seized, has been disposed of, and not a penny of the debts paid, nor even the bailiff's fees on the execution. It may well be asked if the law permits this?

The seizure was warranted under the 151st section of the Act, and the 155th section directs how he is to proceed. He shall immediately after seizing, and at least eight days before the time appointed for sale, give public notice by advertisement put up at three of the most public places "in the division where such goods and chattels have been taken, of the time and place *within the division*, when and *where* they will be exposed to sale." As we read the section, it makes no provision for selling goods taken in execution in any division but that in which they were taken, and the facts of this case do not favour a less limited interpretation. We are not, however, as at present advised, prepared to hold a sale made in another division to a *bond fide* purchaser void. We incline to think it might be upheld; and that either the plaintiff or defendant in the division court execution who sustained loss or damage by such removal and sale, might recover compensation from the bailiff, assuming of course that they neither directed or assented to the removal.

But assuming, as we presume we are bound to do, from

the manner in which the parties have agreed the case shall be presented, that Gallon was a *bond fide* purchaser, the defendant could not be made liable for purchasing from him. *Lord Ellenborough's* dictum in *M'Combie v. Davies* (6 East, 538) would not cover the case, and that dictum has been repeatedly questioned, and the judgment of the court only upheld on the ground mentioned by the other judges, the want of demand and refusal. If Gallon had bought for defendant in fact, though in his own name in form, we think the defendant, being a bailiff of another division court within the same county as that from which the execution issued, would come both within the spirit and the letter of section 157, and that the sale to him being void, if he had the goods in his possession trover would lie with previous demand.

We cannot, however, hold that the plaintiff is entitled to the verdict without the fact having been found that the defendant was, though indirectly, the purchaser at this sale. Assuming that Gallon purchased for himself, the rule must be made absolute.

Rule absolute.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH

FROM TRINITY TERM; 29 VICTORIA, TO TRINITY TERM, 30 VICTORIA.

ABATEMENT.

Plea of former action pending.—
See FALSE IMPRISONMENT.

ACCOUNT STATED.

See ESTOPPEL, 2.

ACTION.

Collision—Canal Regulations—Breach of—Pleading.—The declaration set out certain regulations, made in pursuance of the statute, for the proper use of the Welland Canal, directing that boats waiting to enter a lock should lie in single tier, and advance in the order in which they lay; and that all vessels approaching a lock, while any other vessel going in a contrary direction was about to enter it, should be stopped and made fast as directed, and remain there until such vessel should have passed, under a penalty named. It then

alleged that the defendant's vessel, which was waiting to enter a lock with two other vessels, passed them out of its order, and endeavoured to enter first, and while it was so approaching the plaintiffs' steamboat, going in a contrary direction, was in the lock; but defendant did not stop or make fast his vessel, but wrongfully, and in violation of the regulations, went on and endeavoured to enter the lock, whereby it was driven against the plaintiffs' boat, which was forced against the side of the lock and injured.

Held, on demurrer, declaration bad, for the contravention of the regulations formed no cause of action, and no negligence on the defendant's part was alleged.—*Jacques et al. v. Nicholl*, 402.

Right to restrain defendant from, on ordering his discharge.—See HABEAS CORPUS.

On Division Court judgment.—See JUDGMENT.

By judgment debtor against judgment creditor for not collecting securities given up to him on plaintiff's examination.—See PLEADING.

ADMINISTRATION.

Administration bond—Surrogate Courts Act—C. S. U. C. ch. 16.—

The Surrogate Courts Act, Consol. Stat. U. C. ch. 16, requires a bond from administrators, "conditioned for the due collecting, getting in, and administering the personal estate of the deceased," and enacts that such bond shall be in the form prescribed by the rules and orders referred to in the 18th section of the Act. These rules were those made under the Surrogate Courts Act, 1858, which by the section referred to "are hereby continued."

Held, that such rules being thus sanctioned by the legislature, a bond in accordance with the form prescribed by them must be held sufficient, though it was alleged not to comply with the statute.

Part of the condition of such bond was, that the administrator should, when lawfully called on, make and exhibit an inventory of all the estate and effects which had or should come into his hands. The first breach alleged was that the judge made an order upon him to bring in forthwith an inventory of the goods, chattels, and credits of the deceased, and that he did not make or exhibit an inventory of the goods which had come into his hands, or any inventory. *Held*, that admitting the order to be too large, it was nevertheless good to the extent of the condition, and that the breach, not going beyond such condition, was also good.

Held, also, that it was unnecessary to show the amount recoverable in respect of such breach.

Held, also, that the non-payment of the plaintiff's judgment against the intestate could not be assigned as a breach of the bond, for the Surrogate Courts Act gives no new remedy for the recovery of debts.

Quære, however, as to the mode of carrying out the provisions of section 65.

Per DRAPER, C.J., after joinder in demurrer, the party demurring cannot without consent or leave alter or vary the grounds of demurrer.—*Bell v. Mills et al.*, 508.

ADMISSION.

By not pleading.—See DOWER, 4. **INSURANCE**, 3.

AFFIDAVIT.

Defects in Jurat.—A jurat to an affidavit "sworn before at," etc., omitting the word *me*, *Held*, sufficient, for all might be read as one continuous sentence, when it would mean that it was sworn before the commissioner signing.—*Martin v. M'Charles*, 279.

Improper conduct of magistrate in taking.—See SEDUCTION, 1.

AFFIDAVIT TO HOLD TO BAIL.

Application for discharge.—An affidavit on which an order to hold to bail had been issued stated that defendant was indebted to the plaintiff in \$2615, being the amount of four several promissory notes made by defendant, bearing date the 6th of February 1866 for \$653, 75c. each, payable respectively at forty days, sixty days, three months, and four months after date; and that said notes were given by the defendant for goods purchased by

defendant from the plaintiff. On motion to set aside the arrest, it was objected that this affidavit did not show to whom the notes were made payable, nor in what character the plaintiff held them—but, *Held*, that it was sufficient.

The defendant swore that he had not at the time of his arrest, or of making his affidavit, any intention of quitting Canada with intent to defraud the plaintiff of his debt, but he did not deny or explain any of the facts sworn to by the plaintiff on obtaining the order; and the court, holding that these facts justified the arrest, refused to order his discharge.—*Jones et al. v. Gress*, 594.

AMENDMENT.

See DOWER, 4. HUSBAND AND WIFE, 1.

AMERICAN CURRENCY.

Depreciation of.—See DAMAGES, 4.

APPEAL.

Delay.—Where a defendant having obtained leave to appeal and procured the allowance of his bond delayed to proceed for an unreasonable time, the court ordered the leave to be rescinded, unless he should within a month settle a case to be entered in appeal.—*Clissold v. Machell*, 546.

See CERTIORARI. CONVICTION, 2. COUNTY COURT, 2.

ARBITRATION AND AWARD.

See COMMON SCHOOLS, 1. FENCE-VIEWERS. INSURANCE, 7. RAILWAYS AND R. W. COS., 2.

ARREST.

Examination of judgment debtors—C. S. U. C. ch. 24, sec. 41—*Form of order to commit*.—An order to commit under Consol. Stat. U. C. ch. 24, sec. 41, must be absolute, not conditional.

A County Court judge being dissatisfied with the answers of a judgment debtor on his examination, ordered that he should be committed for six months unless he should forthwith give a negotiable note for the debt made by himself and indorsed by one C. *Held*, that the order was bad, as being conditional.

The deputy sheriff joined with the attorney for the defendant in a plea justifying under such order. *Held*, that the plea being bad as to the attorney, was bad as to both.—*Chichester v. Gordon et al.* 527.

Application for discharge from such commitment on Habeas Corpus.—See HABEAS CORPUS.

See AFFIDAVIT TO HOLD TO BAIL. FALSE IMPRISONMENT.

ASSESSMENT.

See MUNICIPAL CORPORATIONS, 5. TAXES.

ASSIGNMENT.

See INSOLVENT.

ATTACHMENT.

An attachment against an absconding debtor issued by the order of a judge in Chambers may be set aside by another judge.—*Howland et al. v. Rowe*, 467.

ATTORNEY.

Costs—Attorney's lien.—The

plaintiff having recovered judgment against B. and his sureties on a replevin bond for not prosecuting without delay an action of replevin for a schooner, B. moved to have satisfaction entered, showing that a decree in Chancery had established his title to the property, so that the delay had not injured the plaintiff. The plaintiff's attorney claimed a lien on the judgments for his costs as between attorney and client, not only in these suits, but in other actions between the parties upon the same subject of litigation.

Held, that he was entitled only to the taxed costs as between attorney and client in the suits; and satisfaction was ordered to be entered on payment thereof.—*Bletcher v. Burn*, and *Bletcher v. Marsh and Everitt*, 92.

Trespass against execution plaintiffs for seizure under the writ—Liability for acts of their attorney.—*See EVIDENCE*, 2.

See CROWN LANDS. POWER OF ATTORNEY.

AUTER ACTION (PLEA OF).

See FALSE IMPRISONMENT.

BANK.

See USURY.

BAR, TRIAL AT.

See TRIAL AT BAR.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Promissory note—Stamps.*—The plaintiff in September 1865 sued the maker of a promissory note, due in January 1865, payable

to H. or bearer, and by H. indorsed to the plaintiff. Defendant pleaded that it was not duly stamped when the plaintiff became a party thereto, nor until it fell due; and the jury were directed that it was sufficient if the stamps were put on before action brought.

Held (reversing the judgment of the County Court), a misdirection, for the plaintiff became a party to the note by becoming the holder or indorsee, and was bound to stamp it then.—*Henderson v. Gesner et al.*, 184.

2. *Alteration.*—The plaintiff declared upon a note as made by the defendants jointly and severally. *Quære*, whether the interlineation of the words "jointly and severally," of which no explanation was offered, could be taken advantage of under *non fecit*, or whether a special plea was requisite.—*Leslie v. Emmons et al.*, 243.

3. *Promissory note—Indorsement by defendant before payee—Pleading.*—Plaintiff declared upon a note as made by K. to M., and indorsed by M. to defendant, who indorsed to plaintiff. *Plea*, that defendant did not indorse to the plaintiff as alleged. The name of defendant appeared as indorser on the note before that of M.

Held, however, that on the pleadings this was immaterial, for M.'s indorsement to defendant was not denied, and his name appearing before defendant's could not affect the right of recovery.—*Brightly v. Rankin*, 257.

4. *Promissory note—Mistake in amount—Equitable plea.*—Declaration by administratrix of A. on a promissory note for \$140, made by defendant payable to A. or bearer. *Plea*, that at the time of making the

note defendant owed A. \$150, and said note was by mistake made for \$140; that to correct the error defendant immediately made a second note for \$150 at A.'s request, who received it in full satisfaction of defendant's indebtedness and of the note sued on, which was inadvertently left by defendant with A., and after his death came into the plaintiff's hands; that the plaintiff also became possessed of the note for \$150, which she transferred to one F., who brought an action on it against defendant in the Division Court which is still pending.

Held, on demurrer (reversing the judgment of the County Court), a good plea, notwithstanding that the \$150 note was not averred to be negotiable.—*M'Henry and Wife v. Crysedale*, 460.

5. *Declaration* on three promissory notes, made by defendant payable to the order of H. at the Bank of B. N. A. in Montreal, and indorsed by H. to plaintiff. *Plea*, that the notes were made payable in Montreal at the request of the plaintiffs, who resided and had their domicile there, to the order of H., who indorsed the same to the plaintiffs, who received the same for the accommodation of defendant; that by Consol. Stat. L. C. ch. 64, all notes payable in L. C. shall be taken to be absolutely paid and discharged if not sued upon within five years after maturity, and that five years had elapsed. *Replications*—1. That each note was dated at Cornwall, in U. C., and was in fact made by defendant and indorsed by H. there, where they resided, and that this action was commenced within six years. 2. After the same statement of making and indorsing at Cornwall—that neither the defendant nor H. ever

resided or had any property in L. C.; that when the causes of action accrued defendants had gone to, and had ever since resided in, the United States, and plaintiffs were unable to discover their residence or serve them with process till the commencement of this suit; and that according to the law of L. C. plaintiffs could not have sued the defendant there at any time since the cause of action accrued.

Held, following *Hervey v. Jacques*, 20 U. C. R. 366, that by the statute referred to the lapse of five years without suit extinguished the debt, and not merely barred the remedy; and that the defendant therefore must succeed.

The courts are bound to take judicial notice of every public act of the Provincial Legislature, though its operation may be locally limited.—*Darling et al. v. Hitchcock et al.*, 463.

See RELEASE—USURY.

BOND.

Sci. Fa.—*Bond, construction of—Payment by yearly instalments, with interest on unpaid principal—Mode of computing interest.*—*Sci. Fa.* on a bond conditioned to pay \$2782.68 in five equal annual instalments, with interest on the whole amount from time to time remaining due on the 1st of June in each year. The declaration recited that the first instalment and interest, due on the 1st of June 1862, had been paid; that on the 30th of November 1864 damages were assessed for the second and third instalments and interest on the unpaid principal, \$2226, up to the 1st of June 1864, which were paid on the 15th of April 1865; that there

was afterwards a further breach by non-payment of the fourth instalment of principal on the 1st of June 1865, with interest on the said \$2226 from the 1st of June 1864 to the 15th of April 1865, and interest from said 15th of April on the principal remaining unpaid on that day to the 1st of June 1865. The plaintiffs claimed execution for the damages to be assessed on this further breach.

Held, that interest on the \$2226 could not be recovered, for the plaintiffs on their *sci. fa.* for the second and third instalments should have assessed all damages for non-payment of such instalments up to the date of that *sci. fa.*, 30th of November 1864, which would include interest; and their execution for such damages would bear interest also.

Held, also, that the objection might be taken by demurrer to so much of the breach as claimed such interest, for the award of execution being claimed for three separate sums, each claim might be treated as the assignment of a separate breach.—*Randall et al. v. Burton et al.*, 9.

Administration Bond under Surrogate Courts Act—Form of.—See ADMINISTRATION.

Action against surety—Plea, time given to Principal—Necessity for production of bond.—See EVIDENCE.

BOUNDARIES.

See SURVEY, 2, 3.

BRACERY.

See MAINTENANCE.

BUILDING CONTRACT.

Construction.—Declaration on a

contract, by which the plaintiffs agreed to do the carpenter's and joiner's work in erecting a house, etc., for defendant, as shown on the plans prepared by defendant's architect, and to complete the work by the 1st of November, of which house defendant was to complete the residue. It was alleged that it was defendant's duty, and he promised to prosecute his part of the work so as to allow the plaintiffs to complete theirs by the day named, but that defendant delayed so long with the stonework, etc., that a large portion of plaintiffs' work had to be done in the winter at great additional expense; and further, that defendant did not construct his part of the work according to the plans, so that the timbers provided by the plaintiffs became useless, etc.

Plea (in substance), as to the charge that defendant was to make the residue of the house, and defendant's promise to proceed with the stonework, and the alleged causes of action in respect thereof—that the defendant employed an architect to invite tenders for the various descriptions of work, and each person tendering was aware that the work not taken by himself was to be tendered for and done by other contractors, not by the defendant; and that the plaintiffs tendered and contracted for their work, being aware that the tenders of other parties for such other work had been accepted; and so the defendant says he did not contract as alleged.

Held, on demurrer, that the plea showed no defence, for the defendant must be treated as having impliedly undertaken to do what was necessary to enable the plaintiffs to proceed with their contract, and the fact of the defendant having

with their knowledge employed others, against whom they were without remedy, could make no difference.—*Yates et al. v. Law*, 562.

BY-LAW.

See MUNICIPAL CORPORATIONS, 3-5. SURVEY, 3. TEMPERANCE ACT OF 1864.

CALLS ON STOCK.

Action for calls—Omission to appoint place of payment.—See STOCK.

CANAL REGULATIONS.

Breach of, no cause of action.—See ACTION.

CARRIERS.

Delivery to—Effect of.—See TROVER.

CERTIFICATE OF DISCHARGE OF MORTGAGE.

See MORTGAGES.

CERTIORARI.

1. *Conviction—Appeal to Quarter Sessions -- Certiorari.* — Where a defendant, having been convicted on the information of a toll-gate keeper of evading toll, appealed to the Quarter Sessions, where he was tried before a jury and acquitted, this court refused a writ of *certiorari* to remove the proceedings, the effect of which would be to put him a second time upon his trial. — Stewart, Appellant, and Blackburn, Respondent, 16.

2. *Certiorari—Notice—Practice.*

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—Before applying for a *certiorari* to remove a conviction confirmed by Quarter Sessions, notice of the application must be given to the chairman and his associates, or any two of them, by whom the order affirming such conviction was made; and where a *certiorari* had been obtained without such notice, and a rule *nisi* obtained to quash such conviction and order, the *certiorari* was set aside.—The Queen *v. Ellis*, 324.

CHATTEL MORTGAGE.

Sale by mortgagor—Waiver.—E. mortgaged a horse to the defendant in April 1864, and the mortgage contained a proviso that if he should attempt to dispose of the property, the defendant might take possession and sell. E. did dispose of the horse to the plaintiff within a few weeks. This mortgage was not refiled, but the defendant took another in February 1865 for the same money, with other advances. In July, having first discovered the sale, he seized under the proviso.

Held, that having neglected to refile the mortgage and taken another, he had lost his right to seize.—*Courtis v. Webb*, 576.

See IDENTITY.

COMMITMENT.

See ARREST. HABEAS CORPUS.

COMMON COUNTS.

See CORPORATIONS. ESTOPPEL, 2.

COMMON SCHOOLS.

1. *Arbitration between trustees and teacher—C. S. U. C. ch. 126—Evi-*

dence of agreement—Form of award.
—*Held*, following *Kennedy v. Bur-*
ness, 15 U. C. R. 487, that arbi-
trators between school trustees and
a teacher, under the U. C. Com-
mon School Act, acting within their
jurisdiction, are entitled to protec-
tion under Consol. Stat. U. C. ch.
126, as persons fulfilling a public
duty; and therefore that trespass
would not lie against them and
their bailiff for seizing goods to
enforce their award under sec. 86.

It was contended that the arbi-
trators had no jurisdiction, as no
contract under the corporate seal,
required by 23 Vict. ch. 49, sec. 12,
was proved to have been produced
before them; but the plaintiff's
witness said an agreement was
produced which he thought had
the seal, and the plaintiff, as a
trustee, had named an arbitrator
and submitted the matters in dis-
pute. *Held*, that under these cir-
cumstances it might be assumed
that the arbitrators had before them
all that was necessary to give juris-
diction.

Held, also, that the award set
out below was sufficient; and that
the Act 23 Vict. ch. 49, sec. 9,
which directs that no want of form
shall invalidate such awards, should
receive a liberal construction.—
Hughes v. Pake et al., 95.

2. *Loan by township to school*
section—C. S. U. C. ch. 64, sec. 35.
—A township corporation passed a
by-law, reciting that by section 35
of the Upper Canada Common
School Act authority is given to
township councils to collect by
special rate in school sections that
had become indebted to them by
loan, and that a certain section had
borrowed of the municipality \$400,
due at different days; and enacting
that there should be levied in the

section by the collector of the mu-
nicipality the sum of \$262 to
meet a certain portion of said loan.

The by-law was quashed, for
(among other objections) the statute
referred to gives no such authority;
and if it did, it requires provision
to be made for levying the whole
sum borrowed.

The money was said to have
been lent out of the Clergy Re-
serve funds of the township, and
27 Vict. ch. 19, was referred to as
authorizing it, but that statute was
passed after the loan.—*In re Doherty*
and the Corporation of the Town-
ship of Toronto, 409.

CONDITIONS PRECEDENT.

General averment of performance
—*Effect of.*—See RAILWAYS AND
R. W. Cos., 1.

CONSIDERATION.

Statement of in contract.—See
FRAUDS (STATUTE OF).

CONSTABLES.

See POLICE.

CONTRACT.

See BOND. BUILDING CONTRACT.
CORPORATIONS — COVENANT — DA-
MAGES, 4. ESTOPPEL, 3. FRAUDS
(STATUTE OF). LIQUIDATED DA-
MAGES. RAILWAYS AND R. W. Cos.,
1, 5. WAIVER.

CONVICTION.

Proof of.—*Semble*, that a con-
viction returned under the statute
to the Quarter Sessions and filed
by the clerk of the peace becomes
a record of the court, and may be

proved by a certified copy.—*Graham v. M'Arthur*, 475.

Proof of quashing.—To prove the quashing of a conviction on appeal to the Quarter Sessions, it is sufficient to prove an order of that court directing that the conviction shall be quashed, the conviction itself being in evidence, and the connection between it and the order shown. It is not necessary to make up a formal record, for the statute Consol. Stat. U. C. ch. 114, enables the Court of Q. S. to dispose of the conviction by order.—*Neill v. M'Millan*, 485.

Must be quashed before action against Magistrate.—See TEMPERANCE ACT OF 1864, 2:

See CERTIORARI. DISTRESS, 2. PAWNBROKERS.

COPY.

When Evidence.—See CONVICTION.

CORPORATIONS.

Contract ultra vires—Executed consideration.—Defendants being a Joint Stock Road Company under Consol. Stat. U. C. ch. 49, contracted with the plaintiff to build for them four additional miles, an extension of the road originally contemplated, and to pay him by the tolls to be collected there and on three other miles of the road. This mode of payment was not authorized by the Act (sec. 32), but the plaintiff built the road, the defendants accepted it, and levied tolls upon it, and after handing them over to him for some time refused to allow him to receive more, or to pay him for the work done.

Held, that they were liable upon the common counts.—*Thornton v. Sandwich Street Plank Road Co.* 591.

See MUNICIPAL CORPORATIONS. STOCK.

COSTS.

Where proceedings are set aside in Chambers on defendant's application *on payment of costs*, the court will not interfere merely as regards costs except in a very strong case; and defendant having taken out the order cannot be heard to set it aside.—*Martin v. M'Charles*, 279.

Attorney's lien for.—See ATTORNEY.

Application for mandamus discharged without costs, the point being new.—See REGISTRATION.

See COUNTY COURT, 2. EJECTMENT, 2, 5.

COUNTY COURT.

1. *Death of judge—Effect of on rules pending.*—A rule to enter a nonsuit having been granted in the County Court in April term, was duly enlarged until the following term. The judge died before that term began, and no successor was appointed till after its expiration, but the clerk of the court granted a rule to enlarge it. It was argued in October term before the new judge, who treated it as still pending, and gave judgment. *Held* that he was right.—*Leslie v. Emmons et al.*, 243.

2. *Appeal — Practice — Costs.*—The judge of a County Court granted a second new trial, saying that he did so with hesitation, and expressing a hope that the defendant would appeal in order to test the propriety of his course. This court, although thinking that it would have been better to let the verdict stand, declined to interfere with

the discretion of the court below on the evidence; but as the defendant might be said to have appealed in compliance with the wish of the learned judge, the appeal was dismissed without costs.—*Harris v. Robinson et al.*, 247.

Want of jurisdiction—Appeal—Practice.—See *VENUE*.

COUNTY COURT JUDGE.

Duty of on appeal from Court of Revision.—See *TAXES*, 6.

COVENANT.

1. *Construction—Pleading.*—Declaration on a covenant to pay \$1400 on a day named, if the defendant did not make a deed in fee-simple, clear of all encumbrances, of certain land specified to the plaintiff, his heirs and assigns. *Breach*, that defendant did not make a deed in fee-simple, clear of all encumbrances, of the said land to the plaintiff, his heirs and assigns, nor did he pay the \$1400. *Demurrer*, that the breach is uncertain, as it might mean either that defendant made no deed, or not one free from encumbrances, in which case the encumbrances should be stated.

Held, that the breach was sufficient.—*Cully v. Winter*, 34.

2. *Covenant to convey—Who to prepare the conveyance.*—Declaration, that defendants covenanted with the plaintiff that on certain conditions specified they would, by a good and sufficient deed in fee-simple, well and sufficiently convey or cause to be conveyed to the plaintiff a certain lot of land, free from encumbrances made or suffered by defendants; and that

although he performed the conditions, yet defendants did not convey, etc., but, on the contrary, they had not a good title, alleging an encumbrance created by defendants. *Plea*, that the agreement declared on witnessed that defendants should convey or cause to be conveyed to the plaintiff at his expense, by a good and sufficient deed, etc. (as in the declaration), and the defendants have always been ready and willing to execute such a conveyance, but he, the plaintiff, never prepared or tendered it for execution.

Held, that the plea formed no answer, for under such a covenant it was defendants' duty to make a conveyance, and offer to deliver it to the plaintiff on payment of expenses.—*Parker v. Watt et al.*, 115.

3. *Trespass—Pleading—Right of way—Covenant—Breach committed by plaintiff's direction.*—Plaintiff sued defendant for taking his cattle. *Plea*, justifying as for distress damage feasant on defendant's land. *Replication*, that the plaintiff demised to defendant the land mentioned in the plea, reserving a right of way along the west side thereof; and the alleged trespass was the use of such way. *Rejoinder*, that the trespass was beyond the right of way. *Surrejoinder*, that at the time of the lease there was a fence along the east side of the way to prevent horses, etc., straying therefrom; that defendant covenanted by the lease to keep such fence in repair, but removed it, whereby the plaintiff's horses strayed from the way upon defendant's land. *Rebutter*, that the lease contained covenants allowing the plaintiff to enter on the land and view state of repair, and that defendant would repair according

to notice; that the plaintiff directed the defendant to remove the fence along the east side of the way, and use the rails for other purposes, which defendant, with the plaintiff's assistance, and as the act of the plaintiff, accordingly did; and this is the removal referred to in the surrejoinder.

Held, that upon the evidence set out below the jury were justified in finding the rebutter proved by defendant, whether it was a good answer in law to the surrejoinder not being a question for them.

The jury were directed that if the removal of the fence was the plaintiff's act, he was bound, having thus thrown open the way, so to use his right over it as not to injure the defendant's land. *Sem-ble*, that the question of plaintiff's duty in this respect was not really raised by the pleadings, but that the charge was correct.—*Wixon v. Pickard*, 307.

4. *Covenant for title—Action on for equitable defect—Purchase by trustee from cestui que trust—Pleading.*—The declaration alleged that W. (defendant's testator), by indenture made under the Act, conveyed certain land to the plaintiff in fee, covenanting for right to convey, and that he had done no act to encumber; and assigned as a breach, that before the execution of said deed the title was vested in the Bank of Upper Canada, who conveyed to W., being then a director and vice-president of, and as such a trustee for, the said bank; by reason whereof the said W. had not good right to convey, and the said lands were impeached in title and estate, and afterwards many persons to whom the plaintiff had agreed to sell parts of said land refused in consequence thereof to

perform their contracts; and the Court of Chancery, in a suit duly instituted, thereupon decreed the plaintiff's title to be defective for this cause, whereby the plaintiff was unable to enforce said agreements, or to sell the land, etc.

Held, on demurrer, that the declaration showed no cause of action, for (among other reasons) the legal estate passed to the plaintiff, the defect alleged being an equitable one only; no eviction or disturbance was shown; and the alleged proceedings in Chancery would not compel a court of law to hold the title bad.—*Brunskill v. Wilson et al.*, Executors of Widmer, 248.

5. *Covenant for title—Construction—Whether qualified or general.*—Defendant conveyed his equity of redemption in certain land to the plaintiff, subject to two mortgages, one made by himself, the other by a stranger, covenanting that notwithstanding anything done by him he was entitled to such equity and had good right to grant the same to the plaintiff; that the said lands were not subject to any encumbrance but the mortgages mentioned, and that he had done or suffered nothing whereby such equity could be affected; and further, that the said plaintiff might quietly enjoy the land after the 1st of November next without interruption from the defendant or any other person, and that free from all arrears of taxes, and from all former conveyances, mortgages (except the mortgages referred to), judgments, *especially any and all undischarged judgments registered against the lands of the defendant*, and of and from all manner of other charges and encumbrances whatsoever.

Held, that the last covenant was

not restricted to judgments against the defendant, but extended to judgments against his grantor.—*Austin v. Ferguson*, 270.

6. *Covenant against encumbrances—Measure of damages.*—In an action on a covenant that the defendant had done no act to encumber, contained in a conveyance of land by the defendant to the plaintiff for a consideration of £150.

Held, that the plaintiff was entitled to recover the whole amount due upon an outstanding mortgage, although it exceeded the purchase-money and interest, and the mortgage included other lands sufficient in value to satisfy it.—*Connell v. Boulton*, 444.

COVENANTS FOR TITLE.

See COVENANT, 1, 2, 4-6.

CRIMINAL LAW.

1. Falsely personating a voter at a municipal election is not an indictable offence. Remarks as to the form of indictment in such a case.—*The Queen v. Hogg*, 66.

2. *Death caused in a quarrel—Murder or manslaughter—New trial refused.*—P. (the prisoner) and D. (deceased) being brothers, were in the house of the latter, both a little intoxicated. D. struck his wife, and on P. interfering a scuffle began. While it was going on D. asked for the axe, and when they let go P. went out for it and gave it to him, asking what he wanted with it. D. raised it as if to strike P., and they again closed, when the wife hid the axe. While the scuffle was going on D. struck P. twice. On getting up P. kicked

him on the side and arm, and then ran across the garden, got over a brush fence into the road, and dared D. three times to come on, saying the last time that he would not go back the same way as he came. D. seized a stick from near the stove, which had been used to poke the fire with, and ran towards P. In trying to cross the fence he fell to his knees, and P. came forward and took the stick out of his hand. He got up, and as he went over the fence P. struck him on the head with it. The wife entreated him to spare her husband, but he struck him a second time, when he fell, and again while on the ground, from which he never rose. P., in answer to the wife, said D. was not killed, and refused to take him in, saying, "Let him lie there till he comes to himself."

Held, that the evidence was sufficient to go to the jury to establish a charge of murder; that if the death had been caused by the kicks received before leaving the house, the circumstances would have repelled the conclusion of malice; but that whether what took place at the fence was under a continuance of the heat and passion created by the previous quarrel, was, under the circumstances, a question for the jury. A conviction for murder was therefore upheld, and a new trial refused.—*The Queen v. McDowell*, 108.

Act for Repressing Outrages on the Frontier.—See FRONTIER.

See DEFAMATION, 3. DISTRESS, 2. PAWNBROKERS.

CROWN LANDS.

Licences to cut timber.—C. S. C.

ch. 23, sec. 1, enacts that the Commissioner of Crown Lands, "or any agent under him authorized to that effect," may grant licences to cut timber. *Held*, that a person appointed "the agent for crown timber for the western division of Upper Canada" had not as such any power to grant these licences.

A licence to cut was granted to the plaintiff on the 22nd of November 1865. On the 6th of December defendant purchased the land, taking a receipt in full from the bank agent at Chatham. On the 14th he obtained a receipt from the Commissioner of Crown Lands, and on the 6th of February 1866 a patent issued to him. *Held*, that if the licence had been duly authorized, it would not have been revoked by the defendant's purchase until the issuing of the patent.—*Farquharson v. Knight*, 413.

CURRENCY.

Depreciation of—Damages.—See DAMAGES, 4.

DAMAGES.

1. *Action against magistrates—Separate damages against each—Exemplary damages.*—In an action against two justices for one act of imprisonment, charged in one count as a trespass and in another as done maliciously, the jury found \$800 against one defendant and \$400 against the other. *Semble*, that the damages could not be thus severed; but, *Held*, no ground for a new trial, as the finding might be treated as a verdict for \$800 against one defendant, the other being let go free by the plaintiff. *Quære*, as to the proper mode of entering the judgment.

One of the defendants having used insulting expressions to the

plaintiff during the examination, *Held*, no misdirection to tell the jury that they were at liberty to give exemplary or vindictive damages; and that the verdict was not excessive.—*Clissold v. Machell and Mosely*, 80. (This case has been appealed.)

2. *Injury to vessel—Damages—Freight.*—The plaintiffs had undertaken to carry a cargo of stone in their schooner from C. to P., and had got as far as K., where she was injured by the negligence of defendants' servants in towing her. The stone was forwarded by defendants to R. In an action brought by plaintiffs for the injury, *Held*, that they could not recover as damages any part of the freight, for they might adopt the defendants' act, and recover the whole from the consignees.—*Stevenson et al. v. Calvin et al.*, 102.

3. *Trespass—Several defendants—Measure of damage.*—In joint trespasses each defendant is liable for the damage occasioned to the plaintiff by the joint act, and the court will not interfere because as regards one the verdict may be excessive.—*Grantham v. Severs et al.*, 468.

4. *Covenant to pay in N. Y.—Depreciation of currency.*—Defendants in Toronto covenanted to pay \$516 in New York on the 20th of August 1858, which they failed to do, and when sued here in 1865 they claimed to pay in American currency at par, though in the meantime it had become very much depreciated. *Held*, however, that the plaintiffs were entitled to the equivalent of the \$516 in New York on the day of payment, with interest.—*Massachusetts Hospital v. The Provincial Insurance Company*, 613.

Continuing damage.—See RAILWAYS AND R. W. COS., 2.

See COVENANT, 6. ESCAPE, INSURANCE, 3. MUNICIPAL CORPORATIONS, 1.

DEATH.

Of Judge of County Court—Effect of on Rules.—See COUNTY COURT, 1.

DEDICATION.

See HIGHWAY.

DEED.

Quit claim deed—Construction and effect of.—Defendant being in possession of land, executed a deed by which, in consideration of 5s., he remised, released, and for ever quitted claim to the plaintiff, his heirs and assigns for ever, the said land, to hold to the plaintiff, his heirs and assigns, to and for his and their sole and only use for ever. The plaintiff having brought ejectment,

Held, that the deed could not operate as a release, there being no estate or possession in the plaintiff to support it, nor as a conveyance, for want of apt words; and therefore that nothing passed by it (Nicholson v. Dillabough, 21 U. C. R. 594, distinguished).—Cameron v. Gunn, 77.

By Married Woman.—See HUSBAND AND WIFE, 1, 3, 4.

Thirty years old, executed under Power, does not prove the Power.—See POWER OF ATTORNEY.

Words added after signature—Effect of.—See RELEASE.

DEFAMATION.

Slander.—The words “Go home, you whore, and steal more potatoes from Peggy’s field, and steal more chemises from us”—*Held*, actionable, for they imputed that the person addressed had previously stolen other things of the same kind; and the potatoes might have been severed, and so the subject of larceny.—Hunter and Wife v. Hunter and Wife, 145.

2. *Evidence objected to by plaintiff—Verdict for 1s.—New trial refused.*—Slander of the plaintiff as a physician, with respect to his treatment of one H., deceased, whom he had attended after her confinement. Plea, Not guilty. Evidence of statements made by H. to the same effect as the words charged was received, though objected to, as showing that defendant did not originate the alleged slander; and the plaintiff had a verdict for 1s.

Quere, whether such evidence was admissible, but

Held, that its improper reception would be no ground for a new trial, for the plaintiff had notwithstanding obtained a verdict, and he did not move for smallness of damages.—Rogers v. Munns, 153.

3. *Slander—Misappropriation by trustee—C. S. C. ch. 92, sec. 51—Trial de novo.*—In slander the declaration commenced with an inducement that the plaintiff was a merchant carrying on business, and was also engaged in a public object, to wit, the construction of a

public bridge over the river Thames, and was a trustee of large sums of money which he received for the construction of that bridge. Then followed six counts, the first four stating the words which follow to have been spoken of the plaintiff and of the moneys which came into his hands as a trustee as aforesaid: 1. "You have robbed the public of \$1500, and have been using it in your business for years." 2. "You know you have robbed the public and pocketed \$1500 of the funds of the M'Intosh bridge committee, and you have used it in your business for years. It is not the only money you have used in that way; you have made your money in that way." 3. "You have defrauded the public of \$1500, and pocketed the money, and have been using it in your business for years." 4. "Mr. Decow has \$1500 of the public money in his pocket, and is using it." The fifth count charged the following words to have been spoken as before, and also of and concerning the report of certain auditors as to the accounts in relation to the said bridge: "The auditors may make what kind of a report they like, but I can show before a court or any other place he has got that amount of money, and more too, and is using the money." The sixth count alleged these words as spoken of the plaintiff, and of large sums of money which had come into his hands as a trustee, and whereof he was a trustee for the building a certain public bridge; and as to \$1500 of the said money, "Mr. Decow has that amount, and is using it in his own business"—Defendant pleaded not guilty only; and the jury gave a general verdict for \$400. On motion for a new trial, the substantial ground being that the verdict was general, while

some of the counts were defective:

Held, that if so, the proper course would not be a new trial, but a trial *de novo*, which might be ordered on motion for a new trial; but

Held, that each count disclosed a sufficient cause of action, for in each the defendant was charged with a misdemeanour within the Consol. Stat. C. ch. 92, sec. 51, and there was no plea denying that he was a trustee as alleged.—*Decow v. Tait*, 188.

DELAY.

See APPEAL—MUNICIPAL CORPORATIONS, 3.

DEMAND.

Contract to give and procure free passes — Demand required. — See RAILWAYS AND R. W. COS., 5.

DEMURRER.

Per Draper, C.J.—After joinder in demurrer, the party demurring cannot without consent or leave alter or vary the grounds of demurrer.—*Bell v. Mills*, 508.

DESCRIPTION OF LAND.

See RIGHT OF WAY—TAXES, 5.

DISCLAIMER.

By refusing to admit title at Nisi Prius. — See EJECTMENT, 4.

DISCOVERY.

See INSPECTION AND DISCOVERY.

DISTRESS.

1. *Illegal distress—Action for by third party—Pleading—Tender.*—The first count alleged that one H. held premises as tenant to defendants at a certain rent; that the plaintiff's goods being there defendants wrongfully seized the same, as well as all the tenant's goods, as a distress for alleged arrears of rent, to wit, \$401, then claimed by defendants, and afterwards sold the same for such arrears and costs, whereas only \$38 was really due, for which one-fifth of the goods would have sufficed, and the tenant's goods alone would have been more than sufficient. *Held*, under the authority of *French v. Phillips* (1 H. & N. 654), that the count disclosed no cause of action, for, as a count for distraining for more than was due, it averred no tender of the proper sum, and though the plaintiff could make no tender, he could avail himself of one made by the tenant; and if for excessive distress, it should have alleged distinctly that the distress was excessive and unreasonable, or that the proceeds were more than reasonably sufficient.

The second count, after stating the tenancy and that the plaintiff's goods were on the premises, alleged that defendants wrongfully distrained for arrears of rent the said goods of greater value than such arrears and costs, although a small part would have sufficed, and although the tenant's goods also distrained were of themselves sufficient; and that defendants thereby made an excessive and unreasonable distress for said arrears contrary to the statute. *Held*, good, and that it was clearly unnecessary to allege malice.—*Huskinson v. Lawrence et al.*, 58.

2. *C. S. U. C. ch. 123—Form of order and judgment.*—The form of order given in the schedule to *Consol. Stat. U. C. ch. 123* (respecting the costs of distress for rents and penalties not exceeding \$80), states the unlawful charges to have been taken from the complainant "under a distress for (*as the case may be*)."
Held, sufficient to say "a distress for rent," and that it was unnecessary to state such rent to have been under \$80 in order to show jurisdiction.—*The Queen v. Stewart*, 327.

See TAXES, 2.

DIVISION COURTS.

1. *C. S. U. C. ch. 19, secs. 151, 157—Division Court—Sale under executions.*—Executions for about \$200, issued against the plaintiff from the first division court of the county, under which lumber was seized at his mill, within that division. A sale was attempted there without success, and by direction of one of the execution creditors the bailiff had the lumber removed to the county town, thirty miles off, in the fifth division, which cost \$160. It was there bought by G., the deputy sheriff, for \$160, and the defendant purchased from him. The plaintiff having brought trover, the jury were asked only to find the value of the lumber, which they assessed at \$288, and a verdict was entered for that sum.

Upon motion on leave reserved a nonsuit was ordered; for though section 151 provides only for sale in the division where the goods have been seized, yet a sale in another division to a *bona fide* purchaser would pass the property,

leaving the party injured to recover compensation from the bailiff; that G. must be assumed on the finding to be such a purchaser, and defendant could not be made liable for purchasing from him.

Quere, whether on the evidence stated in the case the jury might not have found that G. was in fact purchasing for defendant, who was a division court bailiff; and if so, under section 157 the sale would have been void. Remarks as to the hardship of the case upon the plaintiff.—*Campbell v. Coulthard*, 621.

2. An action will not lie in a county court on a division court judgment.—*Donnelly v. Stewart*, 398.

DOWER.

1. *Mortgagee*. — Dower may be maintained against a mortgagee in fee, although he is not in possession, and the mortgage entitles the mortgagor to hold until default, which has not been made.—*Stewart v. Kay*, 15.

2. *Partnership property*.—Dower—Plea, on equitable grounds, that the land was part of the partnership property and stock-in-trade of the husband and S. trading together as merchants, and was purchased by them as such partners, and paid for out of their partnership moneys, and used in the said partnership business, and that the husband was never seized thereof otherwise than as such partner,

Held, on demurrer, that the plea sufficiently showed the land to have been purchased for partnership purposes; and that it formed a good defence.—*Congér v. Platt*, 277.

3. *Devise—Election*. — Dower—

Plea, on equitable grounds, that the husband by will devised the land to defendant in trust to maintain and support the demandant during her life in provisions, firewood, and everything necessary for her comfort, and allow her the use of two rooms in the house, and all the furniture, and provide her with a horse, two cows, and a servant girl; or if she preferred it, should give her £50 a year, payable quarterly; that such allowance and maintenance was intended by testator to be in lieu of dower; and the demandant, since his death hitherto, in lieu of her dower hath elected to occupy the rooms, etc., and defendant hath provided her with all things required by the will, which she elected to take and did take in lieu of her dower.

Held, plea bad, as not showing a case in which equity would put the widow to her election.—*Baker v. Baker*, 448.

4. *Pleading—Practice*.—The defendant in dower having allowed judgment to go by default, the court, under the circumstances of this case, refused to allow him to plead a release by demandant, or a denial that the husband died seized, as alleged on the plea.

Held, however, that such allegation was not admitted by defendant not pleading, for it was an averment not material to the right of action, and must be proved, if required, to establish a claim to damages.—*Scratch v. Jackson*, 598.

EJECTMENT.

1. *Title acquired after suit—Estoppel*.—The plaintiff brought ejectment on the 6th of September 1865, claiming under a mortgage from

W., the then defendant, in whose place M. was allowed to defend as landlord, claiming under a mortgage from W. to M'I. assigned to him. The mortgage to M'I. was given on the 9th of November 1861, and that to the plaintiff on the 21st of March 1864. On the 21st of September 1865, M'I. by deed reciting an interlocutory decree in Chancery in respect of the foreclosure of W.'s mortgage to him, conveyed to M. as W.'s appointee, and on the 9th of November 1865 by a decree in the same suit this mortgage was finally foreclosed. It was contended that the mortgage to M'I. had merged in the inheritance, and could not be set up against the plaintiff, but

Held, that if it were so the plaintiff could not recover, for when he brought his action he was barred by the mortgage, and he could not avail himself of what took place afterwards.

It was proved that the defendant, in April or May 1865, asserted that he had got a deed of the equity of redemption from W. *Held*, however, that this might refer to the equity as created by the second mortgage, and that the defendant was not estopped from denying W.'s title to mortgage in fee in 1864.—*M'Kay v. M'Kay*, 133.

2. *Proof of title—Possession.*—In ejectment for the east half of a lot, the plaintiff proved a deed to him from S. of the whole lot executed in 1865, and that persons claiming under S. had lived from 1837 to 1850 on part of the west half, building a log house and clearing four or five acres. It was not shown that S. had been dispossessed by any one; and the defendant, with those through whom he claimed, had been in possession

since about 1850. The plaintiff having obtained a verdict, defendants' counsel objecting that no title was shown.

Held, that this evidence was not sufficient to go to the jury; but the attention of the judge at the trial not having been drawn to the particular question, the costs on granting a new trial were ordered to abide the event.—*Shaver v. Jamieson et al.*, 156.

3. An affidavit of service of a writ of summons in ejectment need not state that the copy served was indorsed with the name and residence of the attorney, nor that such indorsement was made on the writ within three days, nor that the service was effected upon the person or tenant in possession.

Where such writ is tendered to defendant, and placed within his reach, and its character explained, *Semble*, that this is a personal service though he refuses to take it up.—*Masters v. M'Charles*, 279.

4. *Disclaimer—Tenancy.*—Where the plaintiff in ejectment claimed as grantee of B., and defendant, besides denying the plaintiff's title, claimed under a demise from B. *Held*, that defendant by refusing to admit B.'s title at the trial must be taken to have disclaimed, and was precluded from setting up the tenancy.

The defendant asserted that he was a yearly tenant, and so entitled to notice; the plaintiff, that he was tenant only from one year's end to the other.

Held, that on the facts stated in the case the receipts for rent afforded no inference as to the nature of the tenancy.—*Houghton v. Thompson*, 557.

5. *Attornment after action—Costs.*

—In ejectment it appeared that the plaintiff had recovered judgment in dower against defendant's landlord, who had submitted to the claim, and the defendant, after this action, had attorned to the plaintiff and paid rent to her attorney. There had been also a demand of possession. *Held*, that the plaintiff was entitled to a verdict and judgment for costs, but not to a writ of possession.—*Fisher v. Johnston*, 616.

See LANDLORD AND TENANT.

ELECTION.

See DOWER, 3.

ELECTIONS.

Falsely personating voter at.—See CRIMINAL LAW, 1.

See MUNICIPAL CORPORATIONS, 2. TEMPERANCE ACT, 1, 3.

ENLARGEMENT.

Of summons after return day.—See HABEAS CORPUS.

EQUITABLE PLEADINGS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4. COVENANTS, 4. DOWER, 2, 3. RAILWAYS AND R. W. COS., 1. RELEASE.

ESCAPE.

Sheriff—Voluntary escape—Action for—Damages.—In an action on the case as for a voluntary escape, the sheriff having allowed the debtor to go on obtaining a bond supposed to be good, but which was afterwards decided to

be insufficient—*Held*, that defendant might show in mitigation of damages the insolvency of the debtor, notwithstanding the escape was in one sense voluntary (*Savage v. Jarvis*, 8 U. C. R. 331, commented on).—*Kinloch v. Hall, Sheriff*, 141.

ESTOPPEL.

1. *Sale for taxes—Fixtures—Estoppel.*—Two millstones were seized and sold for taxes, the tenant of the mill, who was assessed as occupant, being present at the sale and making no objection. In replevin by the owner of the mill against the purchaser, *Held* (affirming the judgment of the County Court), that the tenant's acquiescence was immaterial; for his possession, when proved to be merely as occupant, was no proof of property, and the plaintiff therefore was not prevented from disputing the sale, which was clearly illegal, the stones being part of the mill.—*Grimshawe v. Burnham*, 147.

2. *Action for purchase-money of land—Receipt under seal—Estoppel—Account stated.*—Plaintiff assigned to defendant his interest in a certain lease, by deed containing a receipt for the consideration money, \$350. This deed was placed in K.'s hands to hold till defendant deposited that sum. K. delivered it to defendant on his promise that he would pay, and defendant afterwards paid him \$75, saying that he would hand him the balance as soon as he obtained it. On being asked again he said that he had the money, but that the plaintiff should pay part of the expense of a bond which he had had to give respecting the title. Plaintiff then sued upon the common counts for the

purchase-money of land, and on an account stated.

Held, that he was estopped by the receipt under seal, and could not recover on either count.

Cocking v. Ward, 1 C. B. 858, distinguished, as to the account stated.—Sparling v. Savage, 259.

3. *Contract — Payment — Estoppel.*—The plaintiffs sued the defendant for \$150, money lent, to which the defendant pleaded a set-off against L., one of the plaintiffs, accepted by L. in satisfaction. It appeared that the defendant having built a house for L., cross demands arose out of the contract, and their solicitors negotiated for a settlement; that the \$150 was mentioned, and L.'s solicitor offered to pay \$650 in full of all matters, taking this \$150 into account as a credit to L. The defendant refused to take less than \$700, and sued L., whose solicitor, before he was aware of the suit, paid \$650, and afterwards paid \$50 into court, which was taken out.

The jury were asked whether L. or his attorney agreed absolutely to allow the \$150 as a payment on the contract, or only for the sake of a settlement, which was not arrived at; to which the defendant objected, that if the negotiations proceeded on the supposition that the \$150 was to be so allowed, and L. afterwards paid the \$700 on a different understanding, he was bound so to state at the time.

Held, that the direction was right, and a verdict for the plaintiffs was upheld.—Young et al. (five plaintiffs) v. Taylor, 583.

See COSTS. EJECTMENT, 1, 4. INSURANCE, 7. MUNICIPAL CORPORATIONS, 5. RAILWAYS AND R. W. COS., 1.

EVIDENCE.

1. *Action against surety on bond—Plea, time given to principal—Necessity for production on bond—New trial refused.*—To an action on a bond the plea was the discharge of the defendant as surety by time given to the principal debtor. *Held*, that it was necessary for defendant to prove the bond in order to identify it with the arrangement mentioned in the plea.

The defendant having given no notice to produce, was precluded from giving secondary evidence of the bond, and the plaintiff had a verdict. Considering the nature of the defence set up, the court refused to interfere upon an affidavit by one of the defendants that he was informed and believed the plea could be proved.—Kerr, administrator of Jane Chapman v. Boulton et al., executors of Boulton, 282.

2. *Trespass—Seizure under fi. fa.—Evidence to connect execution Plaintiffs.*—In trespass for seizing goods it appeared that the defendants, who had a claim against one B., instructed their attorney to collect it, and that the attorney having issued execution handed it to the sheriff, informing him that B. lived at Paris, where he kept a fruit-store. The deputy sheriff said it would be a good time "to make a haul" (being near Christmas), to which the attorney answered that it would; and the seizure was then made. The plaintiff having claimed the goods, the attorney told the sheriff to hold possession, as they wished to make inquiries, and the sheriff did so until an interpleader order issued.

Held, affirming the judgment of the county court, that the defendants were bound by the acts and

directions of their attorney, and that there was sufficient evidence to go to the jury to connect them with the seizure.—*Slaght v. West et al.*, 391.

Of jurisdiction in arbitrators.—*See* COMMON SCHOOLS, 1.

Of conviction.—*See* CONVICTION, 1.

Of quashing conviction.—*See* CONVICTION, 2.

Improper reception of, held no ground for new trial.—*See* DEFACTION, 2.

In ejectment.—*See* EJECTMENT.

Husband and wife, plaintiffs—Wife cannot be called by defendant.—*See* HUSBAND AND WIFE, 2.

Of certificate on married woman's deed.—*See* HUSBAND AND WIFE, 3.

Of identity of goods.—*See* IDENTITY.

Of waiver of conditions in policy.—*See* INSURANCE, 1, 5.

Of negligence.—*See* ACTION, MASTER AND SERVANT.

Memorials—When admissible as secondary evidence.—*See* MEMORIALS.

Of power of attorney.—*See* POWER OF ATTORNEY.

Of demand.—*See* R. WS. AND R. W. Cos., 5.

To bring magistrate under protection of sec. 17, C. S. U. C. ch. 126.—*See* TEMPERANCE ACT OF 1864, 2.

Of usurious agreement.—*See* USURY.

See INSPECTION AND DISCOVERY—WITNESS.

EXAMINATION OF JUDGMENT DEBTORS.

Action by judgment debtor against judgment creditor for not collecting securities given up to him.—*See* PLEADING.

See ARREST—HABEAS CORPUS.

EXCHANGE.

See DAMAGES, 4.

EXECUTED CONSIDERATION.

See CORPORATIONS. — FRAUDS (STATUTE OF), 1.

EXECUTIONS.

From Division Court—Sale out of the Division—Effect of.—*See* DIVISION COURT.

See SHERIFF.

FALSE IMPRISONMENT.

Plea in abatement—Prior action pending.—To an action of trespass for assault and false imprisonment, defendant pleaded a prior action pending for the same cause, it being admitted that the former action was on the case. *Held*, that it was not for the same cause, and that the plea, therefore, was not proved.—*Hunt v. M'Arthur*, 90.

FENCES.

See COVENANT, 3. RAILWAYS AND R. W. Cos., 3.

FENCE-VIEWERS.

Fence-Viewers — Award.—This court has no authority to set aside an award of fence-viewers made under Consol. Stat. U. C. ch. 57.

—*In the matter of the award between John Cameron and Thomas Kerr*, 533.

FIRE.

Action against R. W. Co. for fire extending from their track to plaintiff's land.—See LIMITATIONS (STATUTES OF), 2.

Action against sheriff for not levying—Plea, destruction of goods by fire.—See SHERIFF.

FIXTURES.

See ESTOPPEL.

FORMS OF ACTION.

See FALSE IMPRISONMENT.

FRAUD.

See INSOLVENCY. INSURANCY, 3, 5.

FRAUDS (STATUTE OF).

1. *Contract — Consideration.* — The declaration stated that by agreement between the plaintiff and J. and H., two of the defendants, the plaintiff was entitled, on delivering to them certain goods, to a conveyance in fee, free from encumbrances, of two lots mentioned, which were then subject to a mortgage to one Absalom Shade; and in consideration that the plaintiff would accept a conveyance and deliver up the goods, the defendants by an agreement in writing promised to pay the plaintiff \$500 in six weeks, if in the meantime the lots should not be released from the mortgage. Averment, that the conveyance was so accepted and the goods delivered; that the mortgage had not been discharged; and that the defendants had not paid the \$500.

The two agreements were put in. The first, under seal, dated 1st June 1865, set out the sale of the goods by the plaintiff to the defendants J. and H., for which they agreed to pay \$1400—\$200 on receiving possession, \$500 by a conveyance in fee of the two lots, to be taken as cash for that sum, and the remaining \$700 by instalments, as stated in the agreement. The second agreement, dated 10th June, was as follows: "Six weeks after date we, or either of us, promise to pay to Thomas Gibbs Greenham \$500 value received, if in the meantime park lots 7 and 8 in the Garvan survey be not released from the subsisting mortgage thereon to Absalom Shade, deceased." Signed by all the defendants.

Held, assuming the promise sued upon to be within the statute of frauds, either as a contract by the third defendant to indemnify against the default of the others, or as respecting an interest in lands—that the two agreements (the connection between which was established by their contents), construed with the surrounding circumstances to be gathered therefrom, together with the averments in the declaration, sufficiently showed the consideration for the defendants' promise.

Semble, however, that there need have been no writing to bind the third defendant, for the consideration was executed by the plaintiff delivering the goods without getting a conveyance free from encumbrances.

Held, also, that under the first agreement the defendants were not entitled to possession of the goods until payment of the \$200 and execution of the conveyance.—*Greenham v. Watt et al.*, 365.

2. *Contract relating to land.*—Defendant held a note of one S. for

\$980, given to the plaintiff for land, in relation to which land a suit was pending in Chancery by the plaintiff against S. They met in order to settle. The plaintiff requiring first to be relieved from the note which he had indorsed, S. agreed to give a mortgage to defendant on certain land for \$600 and procure K. to mortgage to him other land for \$380; and defendant agreed, as soon as these mortgages were registered, to give up the note to the plaintiff. The mortgages were made and registered, but there was a previous mortgage on the land, and defendant transferred the note to a third person, who recovered judgment against the plaintiff. The plaintiff then sued defendant for not giving up the note, alleging as the consideration for defendant's agreement that S., at the plaintiff's request, would give defendant the mortgages.

Held, that the contract was within the Statute of Frauds as relating to land, and that being verbal only the plaintiff could not recover.—*Johnstone v. Cowan*, 470.

FRONTIER.

28 *Vict. ch. 1*—*Restoration of property seized under*.—Under sec. 11 of 28 *Vict. ch. 1*, for preventing outrages on the frontier, the court can only order restoration of property seized when it appears that the seizure was not authorized by the Act; and in this case, on the facts stated, they refused to interfere, holding that the collector who seized had probable cause for believing that the vessel was intended to be employed in the manner pointed out in the ninth section.—*In the matter of the propeller "Georgian,"* 319.

HABEAS CORPUS.

Committal under C. S. U. C. ch. 26, sec. 41—*Application for discharge on Habeas Corpus—Irregularities—Enlarging summons after return day, etc.*—A county court judge, on the 4th of September, granted a summons calling on a judgment debtor to show cause why he should not be committed to the county gaol of Middlesex for not satisfactorily answering as to his estate and effects, etc., on an examination before a commissioner appointed by the judge. This summons having been enlarged until the 26th of September, and no one attending on either side on that day, the judge, on the following day, on the plaintiff's application, enlarged it, by indorsement, until the 11th of October, of which the defendant had no notice. On the 11th of September the judge had made another order for the debtor to attend before him and be further examined on the 11th of October; but the defendant having lost this order, and believing it to be only a summons for further examination, on which an order would be afterwards made, did not attend upon it. On the 11th of October the judge made an order upon the summons of the 4th of September for the defendant's committal to the county gaol of Lambton, where he had resided since before the date of that summons. Defendant having been committed, applied for his discharge to the judge of the county court, who refused, unless he would undertake to bring no action; and an order was signed for his discharge on these terms, which he declined to accept.

The prisoner having been brought up by *habeas corpus*, it was objected

—1. That the summons having

lapsed on the 26th, could not be enlarged. 2. That the summons was to commit to the county gaol of Middlesex, and the order to that of Lambton. 3. That the order of the 11th of September, for further examination, was a waiver of the previous summons to commit.

Held, that such enlargement under all the circumstances could not entitle defendant to his discharge; that the second objection could have been available only on the return of the summons; and that the order was no abandonment of the previous summons. The defendant was therefore remanded.

Remarks as to the inconvenience, if not danger, of making the writ of *habeas corpus* a mere method of appealing from other tribunals on points more of practice than affecting the merits.

The rule for defendant's discharge, as above mentioned, was returned to the writ of *certiorari* with a certificate by the judge that it had been refused by the defendant's attorney. *Held*, that being so refused it was as if it had not been granted.

Quere, as to the validity and effect of the words in such rule restraining defendant from bringing any action.—*In the matter of Robert Munn*, 24.

HIGHWAY.

Dedication—Ejectment.—D. being owner in fee of the land in question, on the 17th of November 1825 conveyed it in fee to F., a married woman. It continued to be fenced in with other land belonging to D. until 1841, when he removed the fence, throwing this land into Brock Street, in the City of Toronto, on which it had abutted,

and it continued from that time to be used as part of the street. F. died in 1841, whether before or after the removal of the fence was not certain, leaving her husband and eldest son, who was then of age. The husband died in 1864, and the son in that year brought ejectment against the corporation of the city.

Held, that he was entitled to recover, for the dedication to D., being after the conveyance by him, could pass no title to defendants.

Whether the public generally, not these defendants in particular, had acquired a right of way over the land was a question not affected by this decision.—*Fitzgibbon v. The Corporation of the City of Toronto*, 137.

Powers of Municipal Corporations in Repairing.—See MUNICIPAL CORPORATIONS, 1.

Delay in moving against By-law to stop up road—Rule refused.—See MUNICIPAL CORPORATIONS, 2.

In action for not repairing, venue is local.—See VENUE.

HUSBAND AND WIFE.

1. *C. S. U. C. ch. 73—Lease by Wife—Amendment*.—Land which had been conveyed to a married woman was leased by her alone to the grantor for his life; and the defendant having cut timber upon it, she and her husband sued for injury to *their* reversion.

Held, that they could not recover, for the husband was a necessary party to the lease; that the *Consol. Stat. U. C. ch. 73*, recognises his estate in her land during *coverture*, and has made no change in the *conveyance* by married women of their real estate; and even if the

lease could have any operation as between the parties to it, it could not establish the plaintiffs' reversion as against a stranger.

The judge at the trial would not amend by converting the action into one of trespass, and the court refused to interfere.—*Emrick and Wife v. Sullivan*, 105.

2. *Evidence*.—Where husband and wife were plaintiffs in an interpleader issue, asserting the wife's title to the goods seized. *Held*, that the proviso in C. S. U. C. ch. 32, sec. 5, prevented the defendant from calling the wife as a witness, and that the Married Women's Act, ch. 73, had not altered the law in this respect.—*Van Norman and Wife v. Hamilton*, 149.

3. *Married woman's deed*.—*Certificate*.—Where the certificate indorsed on a married woman's deed, executed in Minnesota, was given by a person described as the judge of the District Court in that state, and under the seal of the court, but it was not stated in the certificate (which would have been enough), or otherwise proved, that such court was a court of record.—*Held*, insufficient.—*M'Cammon et al. v. Beaupré*, 419.

4. *Deed of married woman in 1825*.—*Examination and certificate*.—*Statute of Limitations*.—In ejectment defendant claimed under a deed from one C. The land had been granted to A., a married woman; and C. proved that in 1825 he got a deed, since lost, from her and her husband, on which was indorsed a certificate of A.'s examination and acknowledgment by two magistrates, both dead, before whom he took her for that purpose. He bought out the interest of one K., who was in possession

under an agreement to purchase from A. and her husband, and he paid the balance due to them by K., from whom he had received possession. A. and her husband having died within the last five years, their heirs brought ejectment.

Held—1. That the deed passed nothing, for the power to two magistrates to examine and certify was first given in 1831 by 1 Wm. IV. ch. 3.

2. That the plaintiffs were not barred by the Statute of Limitations, for that C., under the circumstances, entered as a purchaser from A. and her husband; that their deed to him being void, he held as tenant at will; and the statute did not begin to run for a year, since which forty years had not elapsed.

Quære, as to the effect of the statute if K. had been merely a trespasser, and C. had obtained possession from him, getting nothing from A. but a void deed.—*Amey et al. v. Card et al.*, 501.

IDENTITY.

Interpleader.—*Identity of Goods*.—In an interpleader issue the plaintiff rested his case upon proof of a chattel mortgage of certain goods mentioned therein, made to him by the execution debtor and duly filed. *Held*, clearly insufficient, for it afforded no proof that the goods mortgaged were the same as those seized by the sheriff and claimed.—*Jones v. Jenkins*, 151.

See INSURANCE, 3.

ILLEGALITY.

Of agreement between R. W. Ccs.

to charge same rates.—See RAILWAYS AND R. W. Cos., 1.

INSPECTION AND DISCOVERY.

Inspection and discovery of documents.—When a judge in Chambers has ordered the inspection and discovery of documents, the court will not interfere unless it appears that such order has not been made “with due discretion, with reference to the facts before him;” and in this case they refused to interfere.

The plaintiffs sued defendants upon a banking account, kept, as they alleged, upon the credit of the defendants; while the defendants asserted that it was upon the credit either of the Detroit and Milwaukee R. W. Co., for whose benefit the money went, or on the credit of Messrs B. & R., two of the defendants’ directors, who acted also for that company.

Inspection and discovery was granted to the plaintiffs, 1, of a statement or report of transactions between defendants and the D. & M. Co., made by accountants for a committee appointed by the defendants. 2. Of letters written by Messrs. B. & R. to the chairman or secretary of the defendants’ company respecting such transactions, and referred to in such report. 3. Of all letters in the defendants’ custody, written or received before the controversy leading to this suit by Messrs. B. & R. as the defendants’ managing and financial directors, to or from the defendants’ chairman, and all the defendants’ books of account relating to the matters in question.

The defendants were also allowed inspection and discovery of letters

written by the plaintiffs’ cashier to a bank in New York, explaining the plaintiffs’ position with the defendants, and on the subject of notes of the Detroit and Milwaukee Railway Co. — The Commercial Bank of Canada v. The Great Western Railway Company, 335.

INSOLVENCY.

Insolvent Act, 1864, sec. 8, sub-sec. 4—Unjust preference—Anticipated delivery.—S. on the 25th of November 1864 agreed to deliver certain timber to the plaintiff at T., in the State of New York, in May, June, July, and August 1865, \$1500 payable down, the same sum on the 15th of January, 1st of March, and 1st of April 1865, and the balance on delivery at T. On the 14th of December following he assigned the timber to L. as security for certain advances in goods which L. agreed to make to enable him to get it out; and on the 27th of February 1865 formally delivered it to L.’s son, who after consulting with S. wrote to the plaintiff that S. desired to deliver the timber to the plaintiff, but was in difficulty; that some of his creditors refused to wait until he could complete his contract, and had commenced actions, and recommending that the plaintiff should anticipate their action by taking a delivery before they could interfere. On the 11th of March the plaintiff accordingly paid L.’s claim and took a delivery. On the 3rd of March L. had served a writ on S., telling him it was to secure precedence; and an execution was obtained in this suit, under which the sheriff seized. On the 14th of April S. made an assignment under the Insolvent Act of 1864 to

the defendant. He admitted that he was insolvent on the 11th of March, and long previous, though he said he did not then know it, and had not informed the plaintiff of it.

Semble, that these facts showed the delivery to the plaintiff to be a transfer by S. "in contemplation of insolvency," the effect of which was to give him "an unjust preference over the other creditors," and that it was therefore void under sec. 8, sub-sec. 4, of the Insolvent Act of 1864; and the jury having found for the plaintiff, a new trial was granted, with costs to abide the event.—*Adams v. McCall*, 219.

Town Councillor vacating his seat by.—See MUNICIPAL CORPORATIONS, 2.

See ESCAPE. RELEASE.

INSURANCE.

1. *Parol waiver of conditions—Pleading*—27 and 28 Vict. ch. 38.—To an action on a policy of insurance, defendants pleaded non-performance of a condition requiring the delivery of a particular account of the plaintiff's loss, verified by his oath or affirmation and by his books of account within thirty days after the loss. The plaintiff replied *de injuriâ*, and at the trial relied upon a parol waiver of this condition by the defendants' managing director and secretary.

Quære, whether evidence of such waiver was admissible, not being specially replied; but

Held, that if replied it would have been no answer to the plea, for it would have been setting up a substituted parol contract in answer to the sealed policy; and a nonsuit was therefore ordered.

The 27 and 28 Vict. ch. 38, gives no authority to the directors to waive by parol the performance of a condition precedent, still less to the managing director and secretary. *Quære*, as to the effect of that statute.—*Scott v. The Niagara District Mutual Insurance Co.*, 119.

2. *Condition requiring a particular account of the loss—Non-compliance with.*—By a condition of the policy sued upon, persons insured were bound, within thirty days after a loss, "to deliver in a particular account of such loss or damage, signed by their own hand, and verified by their oath or affirmation, and by their books of account and other proper vouchers."

The plaintiff sent in his affidavit, stating generally the value of the goods saved and destroyed; a certificate of the Reeve, as the nearest magistrate, as to his inquiry into and belief with regard to the fire being accidental, and of two merchants; and a book containing a statement of the goods lost, made up partly from invoices and partly from recollection, but not verified by his account-books or other vouchers, which he had but did not produce, nor by his affidavit.

Held, clearly no compliance with the condition.—*Greaves v. The Niagara District Mutual Fire Insurance Company*, 127.

3. *Plaintiff's interest—Admission of by pleading—Warehouse receipts—Fraud—Identity of wheat insured with that lost.*—Plaintiff sued upon a policy of insurance on wheat in a certain warehouse, alleging that at the time of effecting the policy, and thence until and at the time of the loss, he was interested in the property to the amount insured. Defendant pleaded that he was not

at the time of the loss interested as alleged.

Held, that on these pleadings it was not admitted that the plaintiff, at the date of the policy, had in the warehouse the quantity mentioned in the receipt, and that in the absence of any proof of the extent of his interest he would be entitled only to nominal damages.

Plaintiff obtained a warehouse receipt from one F. for 2000 bushels of wheat as in store for him, subject to his order, and effected an insurance on it with defendant, as upon so much wheat in F.'s warehouse. *Held*, that in order to recover upon the policy it was not necessary to prove that the identical wheat insured was destroyed; but that the quantity claimed for must have been in the warehouse under F.'s control *during the whole period* between the insurance and the fire.

The warehouseman gave three receipts—1. On the 24th of January, as from himself as owner (as permitted by 24 Vict. ch. 23) for 1700 bushels. 2. On the 26th to the plaintiff for 2000 bushels; and 3. On the 15th of February to one P. for 3000 bushels. The first receipt was transferred by F. to a bank as security for \$1000. When P. bought from F. the last-mentioned quantity, the \$1000 was paid out of the purchase-money, and thus the 1700 bushels were released. F. had given these receipts fraudulently for more wheat than he really had; but the jury found that there were 2000 bushels in the warehouse at the time of the fire. *Held*, that the receipt for 1700 bushels could not stand in the plaintiff's way, the claim on it having been extinguished; and that F.'s fraud on other parties could not be set up by defendants

in answer to plaintiff's claim on the policy.—*Clark v. The Western Assurance Co.*, 209.

4. *Interest—Mortgagor and Mortgagee*.—Declaration on a policy of insurance, effected by the plaintiff with the defendants, alleging that he sued on behalf of and as trustee for one D., to whom he had mortgaged the premises and assigned the policy. *Demurrer*, because the plaintiff shows no interest in the premises, and having none cannot sue as trustee for another. *Held*, that the objections were clearly untenable.—*Richards v. The Liverpool and London Fire and Life Insurance Company*, 400.

5. *Insurance—Account of loss—Waiver—Misrepresentation—Right to recover back premium*.—The conditions of a Mutual Insurance Policy on goods required the insured, in case of loss, forthwith to give notice, and within thirty days after to deliver a particular account of such loss signed with his hand, and verified by his oath, also, if required, by his books of account and other proper vouchers. The account given consisted of his affidavit, stating that the premises were occupied by him as a general merchant's store; that the whole value of the goods and merchandise destroyed was \$800; and some accounts were attached of goods sold to him, showing however only charges of "goods per invoice."

Held, clearly no compliance with the condition.

The defendants' secretary wrote to the plaintiff after the fire that the defendants declined paying his claim in consequence of the facts not being stated in his application for the policy; and the plaintiff relied on this as a waiver of the ac-

count. *Held*, that such waiver should have been specially replied, and *Seemle*, that if it had been, the letter was not evidence of it.

In his application the plaintiff untruly represented the building as furnished with a brick chimney. *Held*, that, on this ground, the policy never attached, and that the plaintiff therefore might recover back his premium.—*Mulvey v. The Gore District Mutual Fire Assurance Company*, 424.

6. *Account of loss*.—The plaintiff suing upon a policy of insurance, which required a particular account of the loss, as in the last case, had given only a statement, that the property insured, consisting of general merchandise in his store, was totally consumed, as were also his books of account, invoices, and papers relating to the business, and that the value, as nearly as could be ascertained without such books, etc., was \$3000. His affidavit was attached verifying this statement. The evidence at the trial, however, showed that he had the means of furnishing a more particular account through those from whom he had purchased. *Held*, no compliance with the condition.

The reasonable construction of this condition is, that the assured shall produce to the company something which will enable them to form a judgment whether the loss or damage claimed for was actually sustained; and so construed it is wholly unobjectionable.—*Banting v. The Niagara District Mutual Fire Assurance Company*, 431.

7. *Compulsory reference at N. P.*—*Making order a rule of court*—*Certificate by arbitrator*.—Action upon a policy of insurance on goods. *Pleas*.—Denying the policy

—setting up that the goods were not destroyed—that the plaintiff gave no notice of the loss as required—misrepresentation as to value of the goods and mode of heating the premises—increase of risk by alteration. After the examination of one witness the judge at *Nisi Prius* ordered a compulsory reference. The award, dated 30th April, was in favour of the plaintiff. The evidence and proceedings, with the exhibits, were annexed, with a certificate signed by the arbitrator, dated 11th May, stating that he certified the same to enable the defendants to move against his award if so advised.

A rule *nisi* was granted in the Practice Court to set aside the verdict and award, and for a new trial or reference back, and was moved absolute in full court, though not on the face of it returnable there. The main objection was that the arbitrator had found due notice and account of the loss given, whereas it was disproved by the plaintiff's own evidence.

Held, 1. That before moving the order of reference should have been made a rule of court.

2. That the objection being to the arbitrator's finding on the evidence, was untenable unless misconduct could be inferred.

3. *Seemle*, that the compulsory reference was authorized; but *Held*, that the defendants, having attended at the arbitration without protest, were precluded from raising this objection.

4. *Seemle*, also, that the certificate could not be looked at, as it was written after the award.

Remarks as to the practice of arguing rules in full court moved in Practice Court.—*Newman v. The Niagara District Mutual Fire Insurance Co.*, 435.

INTEREST.

*Bond payable by instalments—
Mode of computing interest.—See
BOND.*

JOINT-STOCK COMPANIES.

See STOCK.

JUDGMENT.

Held,—affirming the judgment of the County Court, and following *M'Pherson v. Forrester*, 11 U. C. R. 362,—that an action would not lie in a County Court upon a Division Court judgment.—*Donnelly et al. v. Stewart*, 398.

JURISDICTION.

*Want of in County Court.—See
PRACTICE. VENUE.*

When it should appear in by-law.
—*See SURVEY*, 3.

See TEMPERANCE ACT OF 1864, 2.

JUSTICE OF THE PEACE.

*See MAGISTRATES. NOTICE OF
ACTION.*

LANDLORD AND TENANT.

1. *Lease—Action by lessee for
eviction—Justification under for-
feiture for non-payment of taxes—
Pleading.*—Declaration, that de-
fendant demised land to the plain-
tiffs for six years, covenanting for
quiet enjoyment by them if they per-
formed their covenants, which they
did, but that defendant evicted them.

Plea, that the plaintiffs by the
same deed covenanted that they
would during the term pay all taxes,
and that the non-fulfilment of their
covenants, or any of them, should
operate as a forfeiture of the said

deed, and that the same should be
considered null and void; that dur-
ing the term certain taxes were im-
posed on the land, amounting to
\$8.55 for municipal, and \$9.55 for
school purposes, for 1863, which
the plaintiffs did not pay, although
the same were duly demanded, and
they had no distress on the land;
and such taxes in March 1864
were returned by the collectors as
due on non-resident lands, whereby
the said deed and the term became
forfeited and void; and the defen-
dant afterwards peaceably entered,
and became possessed as in his
first estate.

Held, on demurrer, that the plea
was sufficient; that the taxes be-
came due when demanded, and
plaintiffs had not the whole term to
pay them in; that defendant could
enter without bringing ejectment;
and that it was unnecessary to set
out every requisite to show a valid
rate, there being a distinction in
this respect between an avowry
and a justification.—*Taylor et al. v.*
Jermyn, 86.

2. 11 *Geo. II. ch. 19, sec. 16.*—
A landlord may proceed under
this section, though the lease con-
tains no proviso for re-entry.—
Huskinson v. Lawrence, 86.

See COVENANT, 3. *EJECTMENT*,
4. *HUSBAND AND WIFE*, 1.

LEASE.

See LANDLORD AND TENANT.

LEVY.

*Meaning of—Includes seizure and
sale.—See SHERIFF.*

LICENCES TO CUT TIMBER.

See CROWN LANDS.

LICENCE TO SELL LIQUORS.

See TEMPERANCE ACT OF 1864, 2.

 LIEN.

Of attorney for costs.—See ATTORNEY.

 LIMITATIONS (STATUTES OF).

1. *C. S. U. C. ch. 54, sec. 337.—*The Municipal Act, sec. 337, provides that actions against a municipal corporation for not repairing highways must be brought "within three months after the damages have been sustained."

The plaintiff's mare fell through a bridge, and died four months after from the injuries received: *Held*, that the statute began to run from the occurrence of the accident, not from the death.—*Miller v. The Corporation of the Township of North Fredericksburg*, 31.

2. *R. W. Co.—Injury by fire—C. S. C. ch. 66, sec. 83.—*In an action against a railway company for so negligently managing a fire which had begun upon their track that it extended to the plaintiff's land adjoining—*Held*, that "The Railway Act," sec. 83, limiting suits to six months after the damage sustained, did not apply, the injury charged being at common law, by one proprietor of land against another, independent of any user of the railway.—*Prendergast v. The Grand Trunk Railway Company of Canada*, 193.

3. *Statute of Limitations—Possession.—*Where a person having in fact no title has occupied part of a lot of land for twenty years, and

other parts for a less period, he is entitled only to the first-mentioned portion as against the true owner, and it can make no difference that he acted under a belief of title honestly entertained.—*Young et al. v. Elliott et al.*, 330.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 5. HUSBAND AND WIFE, 4. PLEADING. RAILWAYS AND R. W. COS., 2.

 LIS PENDENS.

Certificate of—Registration of.—See REGISTRATION.

 LIQUIDATED DAMAGES.

*Agreement—Liquidated damages or penalty.—*On an agreement to deliver a certain number of withes and traverses of specified qualities and dimensions, for binding and rafting timber, by the 1st of March, and to pay \$4, "as liquidated and assessed damages, recoverable by action of covenant or deductible from the contract money hereinafter mentioned, for each and every day after the said 1st of March that the said withes and traverses, or any part thereof, shall or may be undelivered as aforesaid." *Held*, that the sum named must be treated as liquidated damages, not a penalty; and the stipulation for payment daily of a small sum, instead of one payment large in amount, was regarded as tending strongly to that conclusion.

The plaintiff being entitled to recover on the count claiming these damages, *Held*, that there must be a verdict for the defendant on the other count, on which the jury had assessed the actual damage sustained.—*M'Phee v. Wilson*, 169.

MAGISTRATES.

Improper conduct of in taking affidavit.—See SEDUCTION.

Want of jurisdiction—Trespass—Necessity for quashing conviction.—See TEMPERANCE ACT OF 1864, 2.

See NOTICE OF ACTION.

MAINTENANCE.

Title—Bracery—32 Hen. VIII. ch. 9.—In ejectment it was objected that certain deeds under which the plaintiff claimed, executed in 1835, 1841, and 1844, were void because strangers then held possession claiming the fee. It appeared that one J., in 1842, “bought the possession” from one H., and was succeeded by his son and by the defendant, who had cleared about eighteen acres; and that in 1845 he had negotiated for the purchase of the fee. *Held*, not sufficient to avoid the deeds under the statute of Bracery, then in force, 32 Hen. VIII. ch. 9, for the evidence showed rather that the parties in possession did not claim the fee.

Semble, that the objection, at all events, could have applied only to the eighteen acres cleared.—*Smith et al. v. Hall*, 554.

MANDAMUS.

See MUNICIPAL CORPORATIONS, 2.
REGISTRATION—TAXES, 4.

MARRIED WOMAN.

Conveyance by.—See HUSBAND AND WIFE, 1, 3, 4.

Evidence of wife held inadmissible.—See HUSBAND AND WIFE, 2.

MASTER AND SERVANT.

Negligence of fellow-servant—Liability of master—Evidence.—Ac-

tion against a railway company for the death of one D., an engine-driver in their employment, alleging that they negligently employed one R., an incompetent person, as switchman, and that by his incompetency the collision occurred. It appeared that R. neglected to raise the semaphore at the east end of the Stratford Station, so as to prevent D.’s train going west from entering the yard while a freight train was coming from the west, and this caused the accident. According to the testimony on both sides, R. was an intelligent man, employed at work which one witness said could be learned in a day, another in two or three weeks, and after being a week about the yard he had performed this work regularly for two weeks without complaint until this occasion. A verdict having been found for the plaintiff—

Held, that there was no evidence to go to the jury that defendants negligently employed an incompetent person; that for R.’s neglect, he being D.’s fellow-servant, the plaintiff clearly could not recover; and a nonsuit was ordered.—*Deverill, Administratrix of Deverill v. The Grand Trunk Railway Company*, 517.

MEASURE OF DAMAGES.

See DAMAGES.

MEMORANDA.

Gentlemen called to the Bar—17, 49, 362, 468.

Rules of Court—18, 150.

MEMORIALS.

Secondary evidence of will—Admissibility of memorials—Production of will—Practice.—In ejectment the plaintiff claimed under the heir of B., who died in 1826, leaving a

will, which was shown to be in defendant's possession, who declined to produce it on notice. Two memorials were then offered as secondary evidence, but rejected on the ground that they were not shown to have been registered by any one connected with the suit. It was afterwards proved that a partition deed had been executed in 1848 between the four sons of B., by which the land in question went to I., under whom defendant claimed; and the memorial of the will purported to be executed by S., another of the four sons, as a devisee.

Held, that the memorials *when tendered* were rightly rejected, for the reason given, though they would have been admissible after the subsequent evidence; but as they were not then again offered, and the plaintiff's case was not one to be favoured, the court refused to interfere.

Held, also, that defendant was not compellable to produce the will.—*Hayball v. Shephard*, 536.

MISTAKE.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES, 4. MONEY PAID—RELEASE.**

MONEY HAD AND RECEIVED.

Money had and received—Privy.—Defendant had contracted to supply the Buffalo and Lake Huron Railway Company with wood. In 1858, by instrument under seal between them, in consideration of \$22,000, defendant released the railway company from the contract, and the company covenanted to indemnify defendant against all contracts

made by him with one M., among which was a contract to convey to M. two lots of land; one in South Easthope, which had been leased by plaintiffs to defendant, the other in Zorra, which had been leased by the plaintiffs to one J., who had assigned it to M. In 1865 defendant wrote to the railway company stating that the plaintiffs had claimed from him rent in arrear on these two lots amounting to \$2000; and offering, if the company would pay him that sum, and reconvey the leases, to assume them for the future. The company assented, paid him the \$2000, transferred to him his leases which he had transferred to them, and took a receipt under seal from defendant as in full of all claims for such leases, by which receipt defendant discharged the company of all further liability in respect of such leases under the indenture of 1858. The company had previously paid the rent of both these lots, and defendant after receiving this money paid the rent on the South Easthope lot. The plaintiffs having recovered from defendant as for money received to their use—

Held, that the verdict was wrong; for though the settlement was made on the basis of the amount due to them on the leases, yet it was paid to defendant not as the plaintiff's money, but as the price of the railway company's discharge, and there was no privy between the plaintiffs and defendant.—*The Canada Company v. M'Donald*, 384.

Sale of land for taxes—Payment of redemption money under protest—Right to recover back.—See **TAXES, 1.**

Money paid under mistake of fact.—See **TAXES, 3.**

MONEY PAID.

Mistake—Right to recover.—The mortgagees of a vessel had insured her with the plaintiffs. She was stranded at a place not within the policy; and the plaintiffs, who had received a protest from the captain, assuming that they were liable, sent their agent to get her off. The agent met defendant at the place, and, in his own words, “employed him as he would have employed a perfect stranger” to perform the service, advancing to him \$300 on account. The defendant, it appeared, was in fact an owner of or interested in the vessel, but when acquired or to what extent was not shown. The plaintiffs having discovered that they were not liable, demanded back the money, which defendant refused to pay, alleging that he had used it, and they then sued.

Held, that the jury were warranted in finding for the defendant; for if the money was not paid upon the policy, but advanced upon a distinct agreement, the mistake as to their liability would not enable them to recover.—*Montreal Assurance Company v. M'Cormick*, 440.

Under protest, to redeem land sold for taxes.—See TAXES, 1.

Under mistake of fact.—See TAXES, 3.

MORTGAGES.

Sale of land—Title—Mortgages—Power of Attorney.—In an action by vendor against vendee on an agreement to purchase land, the question was whether the vendor had a good title. It appeared that there were two mortgages upon the land, both paid; of the one an entry of discharge had been duly made in the registry office, of the other a

certificate of discharge had been signed but not recorded. *Held*, that from the entry by the registrar the certificate of discharge, which was not produced, must be assumed to have been in proper form; and as such entry had by the statute the force of a reconveyance the first mortgage could form no objection; but, 2, that as to the second mortgage, though it was paid, the legal estate remained in the mortgagee, and the plaintiffs therefore could not succeed.

The discharge of the first mortgage was executed under a power which, after authorizing the attorney to sell the principal's lands and give receipts for the consideration money, gave power upon payment of all or any debts to give proper and sufficient acquittances and discharges for the same. *Held*, sufficient authority to sign the statutory certificate.—*Lee et al. v. Morrow*, 604.

See CHATTEL MORTGAGES. COVENANT, 6. DOWER—EJECTMENT, 1. FRAUDS (STATUTE OF).

MUNICIPAL CORPORATIONS.

1. *Liability for injury caused in repairing highway—By-law.*—Plaintiff sued defendants for wrongfully cutting a ditch in the highway, and thereby overflowing his land. Defendants pleaded that they necessarily made such ditch in order to repair the highway, doing as little damage as might be, and no more than with due care was necessary for the purpose, which were the grievances complained of.

Held, that the plea was bad, for it alleged a necessity to cut the ditch, but not that the overflow of the plaintiff's land was inevitable.

Semble, that it was bad also for not admitting any damage.

Quære, as to the validity of such a defence if properly pleaded.

Held, also, that no by-law was necessary to authorize the repair of the highway.

Held, also, following the previous decisions in this court, that the defendants were not entitled to notice of action.—*Perdue v. The Corporation of the Township of Chingua-cousy*, 61.

2. *Vacating seat by insolvency—Practice—C. S. U. C. ch. 54, secs. 121, 122.*—On application for a *mandamus* to the mayor of a town to issue his warrant for a new election in place of one M., a member of the council, whose seat it was alleged had become vacant by his having applied for relief as an insolvent debtor—*Held*, that the vacancy must first be established by *quo warranto*, and that *mandamus* was not the proper remedy.—*The Queen v. The Mayor of the Town of Cornwall*, 293.

3. *By-law—Delay in moving against.*—The court refused a rule *nisi* to quash a by-law passed to stop up a road, where the relator was aware of the intention to pass it, and allowed two years and three months to elapse before moving—the objections urged being that there was no applicant for such by-law, and no sufficient notice of it published.—*In re Drope and The Corporation of the Township of Hamilton*, 363.

4. *By-law—Remuneration to councillors—C. S. U. C. ch. 54, sec. 269.*—A by-law directing payment of \$30 to each member of a township council, “being \$20 for services as councillor, and \$10 for services for letting and superintending repairs of roads.” *Held*, bad, as not within the power given

by the Act, C. S. U. C. ch. 54, sec. 269.—*Blaikie and the Corporation of the Township of Hamilton*, 469.

5. *By-law—Equalization of rates—C. S. U. C. ch. 54, secs. 28, 32, 70, 73.*—Declaration on a county by-law to levy money for the general purposes of the year, alleging non-payment by the defendants of the proportion to be raised by them. *Plea*, that in capitalizing the real property not actually rented, but held and occupied by the owners in the towns of N. (the defendants) and C. and the village of D., and in capitalizing the rateable personal property there for the year, the plaintiffs capitalized at ten instead of six per cent., as directed by law, and apportioned thereon among the several municipalities, whereby \$1,000,000 was omitted from the capitalization, and the aggregate value of the rateable property in N., and the amount directed to be raised there, was erroneously and illegally made up.

Held, on demurrer, a good defence, for such capitalization was contrary to the statute; and though it lessened the defendants’ assessment, they were not precluded from objecting, for the plaintiffs could only create a debt by complying with the Act. *Held*, also, that it was unnecessary to quash the by-law, for the court in their discretion might decline to do that, though they could not deny the defendants’ right to contest their liability on any legal ground.—*The Corporation of the County of Lincoln v. The Corporation of the Town of Niagara*, 578.

See COMMON SCHOOLS, 2. CRIMINAL LAW, 1. LIMITATIONS (STATUTES OF), 1. POLICE—SURVEY, 3. TAXES—VENUE.

MURDER.

See CRIMINAL LAW, 2.

MUTUAL INSURANCE COMPANIES.

See INSURANCE.

NEGLIGENCE.

See ACTION. MASTER AND SERVANT. PLEADING—RAILWAYS AND R. W. COS., 2, 3, 4.

NEW ASSIGNMENT.

Trespass — Pleading. — Trespass Quare clausum fregit. Pleas, by defendants C. and M., justifying under a writ of *Hab. Fac.* issued at the suit of defendant G., and delivered to C. as sheriff, who made a warrant to M. as his bailiff, under which M. entered and expelled the plaintiff. The plaintiff replied that defendant C., as sheriff, executed the writ himself, by entering and expelling the plaintiff, before giving the warrant to M.

Held, on demurrer, replication bad, for that the plaintiff's proper course was to new assign, so as to enable defendants to justify or deny the real cause of action.—Waddell v. Corbett et al., 234.

NEW TRIAL.

Verdict under £20.—The rule that a new trial will not be granted where the verdict is under £20, though against evidence, refers to the amount of the verdict, independent of any sum paid into court.

Where, therefore, the verdict was for \$84, exclusive of \$100 paid into court, and a new trial could have been granted only on payment

of costs, the court refused to interfere.—Grimm v. Fischer, 383.

Improper reception of evidence, held no ground for new trial.—See DEFAMATION, 2.

Costs on granting.—See EJECTMENT, 2.

Sum named on payment of which new trial refused.—See RAILWAYS AND R. W. COS., 2.

Granted in an action for Seduction.—See SEDUCTION, 2.

See CRIMINAL LAW, 2. EVIDENCE, 1.

NISI PRIUS RECORD.

In the *Nisi Prius* record the declaration appeared to have been against John Hunter and Ann Hunter his wife, but the words "his wife" were struck out with a pen, of which no explanation was given. *Held*, no objection after verdict.—Hunter and Wife v. Hunter and Wife, 145.

NISI PRIUS PRACTICE.

Defendant in ejectment precluded from setting up tenancy, by refusal to admit landlord's title.—See EJECTMENT, 4.

NOTICE OF ACTION.

Action against J. P.—*Notice of action.*—Where a magistrate acts clearly in excess of or without jurisdiction, he is nevertheless entitled to notice of action, unless the *bonâ fides* of his conduct be disproved; but the plaintiff may require that question to be left to the jury, and if they find that he did not honestly believe he was acting as a magistrate he has no claim to notice.

A notice describing the plaintiff's place of abode as "of the township of Garafraxa, in the county of Wellington, labourer," without giving the lot and concession, *Held*, sufficient.—*Neill v. M'Millan*, 485.

See COMMON SCHOOLS, 1. MUNICIPAL CORPORATIONS, 1.

OUTRAGES ON THE FRONTIER.

Act for repressing, 28 Vict. ch. 1
—*Restoration of property seized under*.
—See FRONTIER.

PAROL EVIDENCE.

Of waiver of condition in policy.
—See INSURANCE, 1, 5.

Words added after signature to deed—Effect of.—See RELEASE.

PARTNERSHIP.

Dissolution—Name of the firm used afterwards.—Defendant, on the 8th of August 1863, gave a bond to the plaintiffs conditioned to pay to the extent of \$2000, debts then due or to be incurred to them by the firm of M. & G., carrying on business at Galt, who the plaintiffs had been supplying with goods.

In July or August 1863 G. went to Buffalo, telling M. that he was going to leave the firm; and before going in June, he gave to the defendant, his uncle, a power of attorney, which recited his intention to reside some time in Buffalo, and that his interest in the firm would continue notwithstanding, and authorized defendant to carry on the business, with power to close it up, and to sign bills, notes, etc., in G.'s name or that of the firm. After he left, the sign, by the defendant's

direction, was changed to M. & Co., but defendant told M. to give notes in the name of M. & G. to the plaintiffs for goods supplied after the date of the power of attorney. In June a notice of intended and in September a notice of actual dissolution was published in a local paper, of which the plaintiffs were not proved to have notice. In April 1864 M., with the defendant's knowledge, signed notes in the name of M. & G., payable at different dates, for the balance according to an account then rendered, and a separate note for goods bought in March previous; and in September 1864 defendant, in writing to the plaintiffs, expressed his hope that it would soon be an advantage to them to continue their account with M. & G. without his guarantee. G. returned to Galt in September 1863, and was employed in the bank of which defendant was agent; but he said he had not authorized his name to be used to the notes given in April 1864. In an action against defendant on this bond, the court being left to draw inferences of fact—

Held, that G.'s return from Buffalo, without in any way interfering with the defendant, was not a revocation of the power; that notwithstanding the dissolution, which must be held to have taken place in September 1863, he might permit his name to be used as it was in closing up the business; that the power sufficiently authorized defendant so to use it; that the inference from the facts was, that in what he did he was acting under such power; and that defendant therefore was liable for the purchases made in March 1864.—*Bryce et al. v. Davidson*, 371.

See DOWER, 2.

PAWNBROKERS.

Pawnbrokers—C. S. C. ch. 61.—Held, that a conviction under the Pawnbrokers' Act, Consol. Stat. C. ch. 61, for neglecting to have a sign over the door as directed by the seventh section, was not sustained by evidence of one transaction alone; for the penalty attaches only on persons "exercising the trade of a pawnbroker."—*Regina v. Andrews*, 196.

PAYMENT.

See ESTOPPEL, 3.

PENALTY.

Agreement—Construction of—Liquidated Damages, or Penalty.—See LIQUIDATED DAMAGES.

PLANS.

Alteration of after registry.—See SURVEY, 1.

PLEADING.

Special action—Securities given up by judgment debtor for collection—Duty of judgment creditor to collect—Negligence—Pleading.—The declaration set out that the plaintiff, being a judgment debtor of the defendants, admitted on his examination before a county court judge that he had in his possession several promissory notes, which the judge, on the defendants' application, ordered him to deliver to the defendants, to be collected by them and applied upon the judgment; that afterwards the judge, on defendants' application, issued a summons to commit the plaintiff for not having done this, whereupon,

on the demand of the now defendants, in obedience to the judge's direction, and to avoid committal, the plaintiff delivered such notes to the clerk of the county court for the use of the defendants, to be so collected and applied, and the surplus, if any, to be paid to the plaintiff. It was then alleged that it thereupon became the defendants' duty to use reasonable care and diligence in collecting these notes, but that they wholly neglected to do so, whereby several of the notes were barred by the Statute of Limitations, some of the parties became insolvent, and the plaintiff lost the amount thereof.

Held, on demurrer, that a good cause of action was shown; for the delivery to the clerk was under the circumstances a delivery to the defendants themselves, and the inference from the facts was that they undertook the duty charged. *Hagarty, J.*, dissenting, on the ground that there was no delivery to the defendants; and if they agreed to undertake the collection it should have been expressly so averred.—*Hall v. Moss et al.*, 263.

Admission by not pleading.—See DOWER, 4. INSURANCE, 3.

Distinction between avowry and justification.—See LANDLORD AND TENANT, 1.

See ACTION—ARREST—BILLS OF EXCHANGE AND PROMISSORY NOTES, 2, 3, 4. BOND—COVENANT, 1, 2, 3. FALSE IMPRISONMENT—INSURANCE, 1, 3. MUNICIPAL CORPORATIONS, 1. NEW ASSIGNMENT—RAILWAYS AND R. W. COS, 1. SHERIFF—VENUE—WAIVER.

POLICE.

Police force—Salaries—C. S. U.C.

ch. 54, sec. 402.—Under this section it is for the city council, not the commissioners of police, to determine the remuneration to be paid to the police force.

Where, therefore, the commissioners, thinking the salary of the chief constable fixed by the council insufficient, had estimated a higher rate, the court refused a mandamus to the city to pay it.—*In the matter of Prince and the Corporation of the City of Toronto*, 175.

POSSESSION.

Effect of as evidence of seizin.—*See* EJECTMENT, 2.

As evidence of property in goods.—*See* ESTOPPEL, 1.

Title acquired by—*Extends only to part occupied.*—*See* LIMITATIONS (STATUTES OF), 3.

See MAINTENANCE.

POWER OF ATTORNEY.

Deed thirty years old—*Power of attorney*—*Proof of.*—The production of a deed thirty years old, purporting to be executed under a power of attorney, does not prove the power.

In this case the only proof of authority was the production of a paper professing to be a copy of an unsealed power of attorney, dated in 1824, and received by the plaintiff's attorney from the son of the person appointed by it, since dead. *Held*, clearly insufficient.—*Jones et al. v. M'Mullen*, 542.

Power to sign discharge of mortgage.—*See* MORTGAGES.

See CROWN LANDS. PARTNERSHIP. STOCK.

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Remarks as to the practice of arguing rules in full court moved in Practice Court.—*Newman v. Niagara District Insurance Co.*, 435.

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QUARTER SESSIONS.

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See MUNICIPAL CORPORATIONS, 2.

RAILWAYS AND RAILWAY COMPANIES.

1. *R. W. Cos.*—*Agreement under*

Consol. Stat. C. ch. 66, sec. 131—Consent of shareholders—Validity of agreements to charge same rates, etc.

—Plaintiffs sued on an agreement entered into by them with defendants, providing for the same rates on through traffic to be charged by each, and a division of the net profits therefrom. Defendants pleaded that the agreement was never submitted to the shareholders of either company, nor did two-thirds of the shareholders, either in person or by proxy, assent thereto, as required by "*The Railway Act.*" The plaintiffs replied, on equitable grounds, that defendants should not be allowed to make this objection, because after the agreement had been made and its provisions entered upon, its existence and working was communicated in written reports by the directors of each company to their shareholders, and announced to them at a regular meeting of shareholders, who then had full notice thereof, and did not dissent therefrom, but ratified and approved of the same, and permitted it to be continued and acted on; and that defendants' stockholders, at a regular meeting, approved of the sums found as balances struck in favour of the plaintiffs on the monthly settlements provided for in such agreement, which sums are now sued for.

Held, such an agreement being only authorized by the statute, "subject to the consent of two-thirds of the stockholders, voting in person or by proxy," that the replication afforded no answer to the plea.

The rule of law and equity in such a case is the same.

Held, also, that in declaring on such an agreement the general averment of the performance of all

conditions precedent was sufficient, without alleging specially that the statutable consent had been obtained.

The contract declared on being for an assimilation of rates, and a division of the net profits on certain classes of traffic, between certain points, was objected to as illegal and contrary to public policy. The question having given rise to great difference of opinion in England, the Court followed the latest decision—*Hare v. London and North-Western R. W. Co.*, 30 L. J. 517—and upheld the contract.—*The Great Western Railway Company v. The Grand Trunk Railway Company of Canada*, 37.

2. *Negligence in construction of railway—Obstruction of watercourse—Action for—Damages recoverable C. S. C. ch. 66, sec. 83.*—The declaration alleged that the plaintiff was possessed of land through which a watercourse was accustomed to flow; and that the defendants so negligently and unskillfully constructed an embankment for the purposes of their railway across the said stream, by not providing sufficient openings for the water, that his land was overflowed.

It was proved that the plaintiff went into possession in 1853, about the time that the railway was commenced, and that the patent issued to him in 1859. The railway passed through his land upon an embankment, and defendants put in a culvert some distance from the channel by which the land had formerly been drained, but it did not answer the purpose, and after this suit had been commenced they made another at the old channel. The plaintiff, in consequence of the overflow, was unable to use

several acres which he had cleared, the damage varying both as to time and extent, but never wholly ceasing. No evidence was given as to the terms on which defendants obtained their right of way from the plaintiff. The jury found for the plaintiff, who claimed damages for six years, giving \$300.

Held, that the action would lie, there being no presumption from defendants' entry and construction of the railway with the plaintiff's acquiescence that the plaintiff had obtained compensation for the *negligence* complained of; but that by Consol. Stat. U. C. ch. 66, sec. 83, the plaintiff could not claim damages for more than six months next before the action.

As the plaintiff was thus entitled to recover, though not to the extent of the verdict, the court named a sum, \$100, on payment and acceptance of which the rule for a new trial should be discharged without costs.—*M'Gillivray v. The Great Western Railway Company*, 69.

3. *Fences*—*Consol. Stat. C. ch. 66, sec. 13*.—The obligation of a railway company, under section 13 of "The Railway Act," to maintain fences on each side of their track involves the duty of a continuous watchful inspection, and they must take notice of its state at all times.

Held, therefore, in an action by an adjoining proprietor for injury to his horses getting upon the track through defect of fences, that it was a misdirection to tell the jury that if the fence became out of repair, and before the plaintiff notified the defendants, or before a reasonable time for the defendants to repair it had elapsed, the horses got through, the defendants would not be liable.

Quære, as to the liability if the

fence, being sufficient, had been prostrated by an extraordinary tempest and repaired without unnecessary delay.—*Studer v. The Buffalo and Lake Huron Railway Co.*, 160.

4. *Railway Act, sec. 147*—*Horses not "in charge."*—The plaintiff's son, as it was getting dark, was taking three horses along a road which crossed defendants' railway, riding one, leading another, and driving the third. This last horse, being from sixty to one hundred feet in front, attempted to cross the track as a train approached, and was killed,—*Held* upon a bill of exceptions tendered in the County Court and error thereon, that the horse was not "in charge of" any person within Consol. Stat. C. ch. 66, sec. 147, and that the plaintiff could not recover.—*Markham v. The Great Western Railway Company*, 572.

5. *R. W. Cos.*—*Covenant to give and procure free passes*—*Construction*—*Demand*.—The plaintiffs by deed, dated the 1st of October 1853, leased to defendants the railroad floor of the Niagara Falls Suspension Bridge, with the right to extend to other companies the privilege of crossing such bridge with locomotives and trains; the plaintiffs agreed to allow the directors and employees of the defendants, and such other railway companies as they should make arrangements with, free tickets to pass the bridge; and defendants agreed to allow from their own and procure from the railroad companies with whom they should arrange for the use of the bridge aforesaid, free tickets for the directors and officers of the plaintiffs to pass over their respective railways.

Defendants in 1855 made an agreement with the New York Central R. W. Co. "to render more convenient their interchange of freight and passengers at the bridge," by which the New York Co. were to convey across the bridge on their cars the freight brought by them for the G. W. Co., etc.

Up to 1860 the defendants gave the directors and officers of the plaintiffs annual passes over their railway, and up to 1858 procured for them passes from the N. Y. Co.; but they then refused to give more than special passes over their own road, to be used only on the business of the plaintiffs, and limited to one trip; and as to passes over the N. Y. road, they contended that they had never been demanded, or if they had, that they were not bound to procure them.

Held—1. That defendants were bound by the covenant, and the passes could not be confined to the plaintiffs' business.

2. That the New York Co. was within the agreement, so as to entitle the plaintiffs to demand passes on that railway from defendants.

3. That a demand of the passes by the plaintiffs was necessary; for though the plaintiffs might not know with what other companies defendants had made arrangements, yet they would be aware, while defendants might not be, for what persons such passes were demandable.

4. That taking the previous usage in giving tickets into consideration, the letters given below constituted a sufficient demand.

5. That considering such usage, which showed the intention of the parties at the time, and the inconvenience of a different construction, it might be held that the passes

should be annual, not for each trip.—The Niagara Falls International Bridge Company and The Niagara Falls Suspension Bridge Company *v.* The Great Western Railway Company, 313.

See LIMITATIONS (STATUTES OF),
2. MASTER AND SERVANT. TAXES,
6.

RECEIPT UNDER SEAL.

Estoppel by.—See ESTOPPEL, 2.

REGISTRATION.

29 *Vict. ch. 24, sec. 73*—*Registry*—*Certificate of Lis Pendens*—*Land divided into Village lots*—*Mandamus*—*Costs.*—The Registrar was required to record a certificate of *lis pendens* affecting "lot number sixteen in the ninth concession of the township of Erin, and lots numbers fourteen and fifteen in the tenth concession of the same township," which he refused to do, as the west halves of lots fourteen and fifteen had been laid out into village lots according to a plan filed in his office. On application for a mandamus, *Held*, that so far as regarded the west halves he was right, for by the Registry Act, 29 *Vict. ch. 24, sec. 73*, the certificate should show the village lots affected.

The point being new, and there being no difficulty in recording the certificate against lot 16, the rule for a mandamus was discharged without costs.—*In re Thompson et al. and Webster, Registrar of the County of Wellington*, 237.

Alteration of Plans after Registry.—See SURVEY, 1.

See MEMORIALS. MORTGAGES.

RELEASE.

Promissory note—*Release of sure-*

ty—Replication, mistake in the release—Words added after signature to deed, effect of.—Declaration on a promissory note made by defendants P., W., and D., jointly and severally, payable to plaintiff.

Equitable pleas. 1. By defendant D.—that he made the note as surety for defendant P., of which the plaintiff was aware when he took it, and that after it became due the plaintiff, without his knowledge, by deed released P. therefrom. 2. By defendant W.—that he and defendant D. made the note for the accommodation of P., as his surety, to secure a debt due to the plaintiff solely from P.; that it was delivered to and accepted by the plaintiff from the defendants upon an express agreement that W. and D. should be liable only as sureties; and that the plaintiff, without W.'s consent, by deed released P.

Equitable Replications.—1. That the pleas each refer to the same deed; that at the time of making it P. was indebted to the plaintiff in \$250 on an account stated, as well as for the amount of the note; that it was intended and agreed only to release the \$250, and not the note; that for the purpose of so confining the deed the plaintiff added after his signature thereto, "\$250, not any sureties on this;" and that the note was not included, or intended by defendant P. or by the plaintiff to be included, in the debts released by the deed.

2. That the release was drawn and executed by mistake, the intention of the parties thereto being to execute a consent only to a discharge of P. under the Insolvent Act of 1864, and it should have been drawn so as to operate in that

way only, and not as a discharge of any sureties.

Held, on demurrer, that at law the first replication would be bad, for the words added formed no part of the release, and it therefore set up oral matter to qualify the deed; but that on equitable grounds it was sufficient. *Held*, also, that the second replication was bad.—*Fowler v. Perrin et al.* 227.

RE-SURVEY OF TOWNSHIP.

See SURVEY, 3.

RIGHT OF WAY.

Description of.—A right of way ten feet wide, described as running north from a certain street, equally upon, along, and between two lots, to the depth of sixty feet, and then at right angles—*Held*, to extend only sixty feet between the lots, so that the crossway would lie within that distance, not ten feet beyond it, which would make the depth seventy feet.—*M'Cammon v. Beauprè*, 419.

See COVENANT, 3. HIGHWAY.

RIVER.

Lots fronting on—Boundaries of.—*See* SURVEY, 2.

RULES OF COURT.

As to New Trial Paper, 18.

As to costs of Subpœnas, 150.

As to Trial of Issues, when there are issues in law and fact, 150.

SALE OF GOODS.

Stoppage in Transitu—Trovee by Vendor.—*See* TROVER.

Waiver of Delivery at the time agreed on.—See **WAIVER**.

SCHOOLS.

See **COMMON SCHOOLS**.

SEDUCTION.

1. *C. S. U. C. ch. 77.*—The mother of an illegitimate daughter cannot, under the Seduction Act, maintain an action for the seduction of such daughter while she was living with the defendant.

Remarks by *Draper, C.J.*, as to the effect of the statute in attaining its object.—Peter and Mary Hicks v. Ross, 50.

2. *New trial—Misconduct of magistrate in taking affidavit.*—New trial granted to defendant in an action of seduction.

It was stated in an affidavit in support of the rule that the plaintiff had sworn before a magistrate that defendant never had criminal connection with her. The magistrate, in an affidavit used on showing cause, stated that the defendant's brother S., with the girl said to have been seduced, and her mother, came to him together, saying that the girl was going to clear his brother, that his mother was very ill, and the rumour was affecting her very much; that he, the magistrate, wishing to do something to let the old lady die easy, and at the same time to let the girl have a chance to swear the child on S., inserted in the affidavit taken before him the words *criminal connection* instead of *carnal connection*. Such conduct very strongly censured.—*M'Iloy v. Hall*, 303.

SERVANT.

See **MASTER AND SERVANT**.

SERVICE.

Of writ of summons in ejectment.
—See **EJECTMENT**, 3.

SHERIFF.

Action for not levying—Destruction of goods by fire—Pleading.—Declaration against a sheriff for not executing a *fi. fa.*, alleging that there were goods out of which he could have levied the money indorsed, but that he did not levy the same. *Plea*, that before he could by due diligence have levied the moneys the goods were destroyed by fire.

Held, on demurrer, plea bad, for levying includes seizure and sale, and consistently with the plea the goods might have been destroyed in defendant's custody after seizure, in which case he would be liable.—*Ross v. Grange, Sheriff*, 396.

Action against for escape—Damages.—See **ESCAPE**.

SHIPS.

See **DAMAGES**, 2.

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See **DEFAMATION**.

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See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 1.

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- 32 H. VIII. ch. 9.—See Maintenance.
 11 Geo. II. ch. 19, sec. 16.—See Land-
 lord and Tenant, 2.
 6 Geo. IV. ch. 7.—See Taxes, 5.
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 Consol. Stat. C. ch. 58.—See Usury.
 Consol. Stat. C. ch. 61.—See Pawn-
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 tions (Statutes of), 2. Railways and Rail-
 way Companies.
 Consol. Stat. C. ch. 77.—See Survey, 3.
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 tion, 3.
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 ministration.
 Consol. Stat. U. C. ch. 19.—See Division
 Courts.
 Consol. Stat. U. C. ch. 22 (Common
 Law Procedure Act).—See Insurance, 7.
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 band and Wife, 2.
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 tions (Statutes of), 1. Municipal Corpora-
 tions. Police.
 Consol. Stat. U. C. ch. 55.—See Taxes.
 Consol. Stat. U. C. ch. 57.—See Fence-
 Viewers.
 Consol. Stat. U. C. ch. 64, sec. 35.—
 See Common Schools, 2.
 Consol. Stat. U. C. ch. 73.—See Hus-
 band and Wife, 1, 2.
 Consol. Stat. U. C. ch. 77.—See Seduc-
 tion, 1.
 Consol. Stat. U. C. ch. 93.—See Sur-
 vey, 2, 3.
 Consol. Stat. U. C. ch. 123.—See Dis-
 tress, 2.
 Consol. Stat. U. C. ch. 126.—See Com-
 mon Schools, 1. Notice of Action. Tem-
 perance Act of 1864, 2.
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 Exchange and Promissory Notes, 5.
 18 Vict. ch. 211.—See Stock.
 23 Vict. ch. 49.—See Common Schools,
 1.
 24 Vict. ch. 49.—See Survey, 1.
 27 Vict. ch. 19.—See Taxes, 2.
 27 and 28 Vict. ch. 4.—See Bills of Ex-
 change and Promissory Notes, 1.
 27 and 28 Vict. ch. 18.—See Temperance
 Act of 1864.
 27 and 28 Vict. ch. 17.—See Insolvency.
 27 and 28 Vict. ch. 38.—See Insurance,
 1.
 23 Vict. ch. 1.—See Frontier.

28 Vict. ch. 22.—See Temperance Act of
 1864, 2.

29 Vict. ch. 4.—See Bills of Exchange
 and Promissory Notes, 1.

29 Vict. ch. 24.—See Registration.

STOCK.

18 Vict. ch. 211.—*Action for calls
 under—Omission by directors to ap-
 point place of payment.*—The plain-
 tiffs' Act of incorporation provided
 that stockholders should pay up
 their shares "by such instalments
 and at such times and places as the
 directors of the said corporation
 shall appoint," It provided also
 for the appointment of a managing
 director, "to whom shall be dele-
 gated the special management of
 the business of the society."

The directors passed a resolution,
 ordering a call, payable in two pay-
 ments on days specified, and direct-
 ing the secretary to notify the
 stockholders according to the Act.
 A notice, signed by the managing
 director "by order," was published,
 and a circular signed by him sent
 to each shareholder, in which the
 place of payment was mentioned;
 but there was no meeting of direc-
 tors between the passing of the
 resolution and the day named for
 payment.

In an action for this call it was
 objected at the trial that the direc-
 tors had appointed no place of pay-
 ment, the advertisement and circular
 being the act of the managing
 director only.

Held, reversing the judgment of
 the county court, that the objection
 was fatal; and a nonsuit was or-
 dered.—*The Provident Life Assur-
 ance and Investment Company v.
 Wilson*, 53.

STOPPAGE IN TRANSITU.

*Effect of on right of property and
 possession.*—See *TROVER*.

STREETS.

Right to close after registry of plan.—See SURVEY, 1.

See HIGHWAY.

SUMMONS AND ORDER (IN CHAMBERS).

Enlargement of summons after return day—Waiver of summons by subsequent order.—See HABEAS CORPUS.

SURETY.

See PRINCIPAL AND SURETY.

SURROGATE COURTS.

See ADMINISTRATION.

SURVEY.

24 Vict. ch. 49—*Alteration of plan—Closing up streets.*—1. C. owned township lot 32, and H. lot 31 adjoining it on the east. In 1856 H. laid out part of 31 into village lots, according to a registered plan, which showed streets called First, Second, Third, and Fourth Streets, etc., running from east to west across the block, to the east limit of lot 32. In 1858 C. laid out the east part of lot 32 by a plan also registered, by which a street called Augusta Street ran north and south along the east side of 32, and from it streets ran westerly numbered 1, 2, 3, 4, etc., corresponding to and a continuation of First, Second, Third, and Fourth Streets on H.'s block, Augusta Street only intervening. Village lots had been sold on Street 4 in C.'s block, but none on Fourth Street on H.'s land, and the closing this last-mentioned

street would not shut out a purchaser of any lot from access to the nearest highway.

Held, that under 24 Vict. ch. 49, the owner of H.'s block might by a new survey and plan close up Fourth Street on his land; for the laying out a street in continuation of it by C. did not make all one street, so as to render the proviso in that statute applicable.—*The Queen v. Rubidge*, 299.

2. *Township of Smith—Lots fronting on a river*—C. S. U. C. ch. 93, sec. 27.—The three easterly lots only of one concession in a township (Smith, in the county of Peterborough) were bounded in front by a river, and the line had been run in the original survey in front of such concession, up to though not past these lots, but the township itself fronted upon another township.

Held, clearly not a township bounded in front by a river, within the C. S. U. C. ch. 93, sec. 27, so that resort might be had to the posts in the concession in rear to determine the side lines of these three lots.

Quere, whether such a case is provided for by the statute.—*Johnson v. Hunter*, 348.

3. C. S. U. C. ch. 93, secs. 6-9—C. S. C. ch. 77, secs. 58-61.—The county council passed a by-law directing a township municipality to levy and collect from the *patented and leased lands* of the township a certain sum required to reimburse the expenses incurred in a re-survey of the township. *Held*, that the by-law was illegal, for the statute directs that such expense shall be defrayed by the "*proprietors*" of the lands interested.

Semble, that the jurisdiction to

pass such a by-law should appear on the face of it, by showing a survey such as the statute contemplates.

Quære, whether the Act authorizes the re-survey of a whole township.—*In re Scott and the Corporation of the County of Peterborough*, 453. [It has since been decided that it does not.—*See Scott and The Corporation of Peterborough*, 26 U. C. R. 36.]

See REGISTRATION.

TAXES.

1. *Sale of land—Payment of redemption money under protest—Right to recover back.*—Where lands were sold for taxes, and after the expiration of a year the owner paid under protest to the County Treasurer the sum required to redeem them.

Held, that he could not recover this sum from the county as money had and received, for under section 148 of the Assessment Act it was received, not for his use, but for that of the purchaser; and the payment of redemption money to deprive the purchaser of his rights must be unqualified.—*Boulton v. The Corporation of the United Counties of York and Peel*, 21.

2. *Taxes—Non-resident lands—27 Vict. ch. 19.*—A lot of land being in arrear for taxes for six years up to 1859 inclusive, during which it had been assessed as “non-resident” land, was duly returned in 1865 under 27 Vict. ch. 19, as occupied by the plaintiff, who had become tenant of it on the 1st of April of that year. These taxes were placed upon the collector’s roll, and in order to satisfy them he

seized the plaintiff’s goods upon another lot in the same township.

Held, that such seizure was unauthorized.—*Warne v. Coulter*, 177.

3. *Taxes paid under mistake of fact—Right to recover back—C. S. U. C. ch. 55, sec. 61.*—The plaintiffs had for several years appealed from the assessment of their property to the Court of Revision, who had decided against them, and from thence to the County Court judge, who had reduced it one-third, on the ground that a large portion of their building was occupied by the courts. In 1864, the same assessment being repeated, they appealed to the Court of Revision, who said they would consult the city solicitor, and that the plaintiffs need not appear again. The plaintiffs’ solicitor was told by the clerk of the Court of Revision that no judgment had been given, and found none in the book where their decisions were entered. The collector in October called upon the plaintiffs’ secretary, who supposing all was right, paid the sum assessed. The mistake having been discovered in the following year,

Held, that they might recover it back; for the Court of Revision not having determined the appeal, the roll, as regarded the plaintiffs, was not “finally passed” within sec. 61 of the Assessment Act, so as to bind them. *Hagarty, J.*, dissenting, on the ground that the return of the roll unaltered as regarded the plaintiffs’ assessment was in effect a decision against them.

A person seeking to recover money paid under a mistake of fact is not now bound to show that he has been guilty of no laches; the only limitation is that he must not waive all inquiry.—*The Law Society of Upper Canada v. The Corporation of the City of Toronto*, 199.

4. *Assessment—Court of Revision*—Six days' notice of appeal to—Waiver—C. S. U. C. ch. 55, sec. 60—*Mandamus*.—An elector served the clerk of the municipality with notice that several persons had been wrongfully inserted on the assessment roll, and others omitted, or assessed too high or too low, and requesting the clerk to notify them and the assessor when the matters would be tried by the Court of Revision. On the 22nd of May the court met, when it was objected for the parties named that six days' notice had not been given, but only five. The court then adjourned until the 30th, directing proper notice to be given, which the clerk omitted to do, and in consequence they refused on the 30th to hear the appeal, and finally passed the roll. On application for a mandamus to compel them to hear and determine the matters,

Held, that they were right, the six days' notice being imperatively required by the Act; and that the appearance of the parties by their counsel to object to the want of such notice was not a waiver of it.

Semble, that, if this were otherwise, the proper course would have been a mandamus to the Mayor to summon the Court of Revision, under sec. 55 of the Assessment Act.—*The Queen v. The Court of Revision of the Town of Cornwall*, 286.

5. *Sale of lands*—6 Geo. IV. ch. 7—*Description of land*.—*Held*, that a description in the sheriff's deed of land sold for taxes under 6 Geo. IV. ch. 7, as "twenty-five acres of lot 31 in the 12th concession of the township of King," was insufficient.—*Cayley et al. v. Foster*, 405.

6. *Railway — Assessment*. — The

Court of Revision confirmed the assessment of a lot of land occupied by a railway company at \$1200 annual value, and assessed the station built upon it at \$1500; and the County Court judge being appealed to confirmed the value of the station, "subject to the question" whether it could be assessed in addition to the land, "and left for the determination of a higher court," whether after the valuation of the land had been fixed in accordance with sec. 30 of the Assessment Act the building could be added.

Held, that this was in effect a confirmation of the assessment, the reservation being inoperative, and that the court had no power to review the decision.—*The Corporation of the City of Toronto v. The Great Western Railway Company*, 570.

Action by lessee for eviction—Justification under forfeiture for non-payment of taxes.—See LANDLORD AND TENANT, 1.

TEMPERANCE ACT OF 1864.

1. *Temperance Act of 1864*.—Where a by-law was passed under "The Temperance Act of 1864," having been adopted by the electors at a meeting at which the township clerk took the poll and conducted all the proceedings, no person presiding thereat as directed by sec. 3, sub-sec. 3,—*Held*, that the provision was imperative; that in the absence of the person appointed to preside no poll could be legally taken; and the by-law therefore was quashed, with costs.

Although no one appeared to show cause, the court, having regard to the evident intention of the legislature to sustain such by-laws unless clearly bad, would not make the

rule absolute without seeing that the objections were fatal.—*In the matter of David Hartley and the Corporation of the Township of Emily*, 12.

2. *Temperance Act of 1864*—28 Vict. ch. 22 — *Effect of*—*Action against J.P.* — *Quashing conviction* — C. S. U. C. ch. 126, secs. 3, 17—*Proof of conviction.*

“The Temperance Act of 1864,” and the 28 Vict. ch. 22, for the punishment of persons selling liquor without licence, are intended to stand together. The first is limited to municipalities where a Temperance By-law is in force, and suspends the second there during the continuance of such by-law, leaving it to apply elsewhere in U. C.

Therefore where defendant sitting alone as a magistrate convicted the plaintiff for selling liquor without a licence in a township where such a by-law was in operation, *Held*, that he was liable in trespass, for the Temperance Act gives jurisdiction only to two justices.

Held also, however, that the conviction, though void, must be quashed, under Consol. Stat. U. C. ch. 126, sec. 3, before such action would lie.

The warrant of commitment directed the plaintiff to be kept at hard labour, which the Temperance Act does not authorize. The turnkey swore that the plaintiff “did no hard work in gaol.” *Held*, not sufficient to negative that he was put to some compulsory work, so as to bring defendant within sec. 17 of the last-mentioned Act.—*Graham v. M'Arthur*, 478.

3. *Temperance Act of 1864*.—Upon the affidavits in this case, substantially stated in the report, the court refused to set aside a by-law passed under “The Temperance Act of 1864,” on the ground that

the reeve did not “preside” at the meeting at which it was adopted, but the clerk. There was no doubt that he opened and closed the poll, but the affidavits were contradictory as to the length of and reason for his absence in the meantime.—*In the matter of M'Lean and the Corporation of the Township of Bruce*, 619.

TENANT.

See LANDLORD AND TENANT.

TENDER.

See DISTRESS, 1.

TIMBER.

See CROWN LANDS.

TITLE.

See COVENANTS. DEED. EJECTMENT.

TRESPASS.

Arbitrators under School Act not liable in.—*See* COMMON SCHOOLS, 1.

For seizure under Fi. Fa.—*Evidence to connect execution plaintiffs.*—*See* EVIDENCE, 2.

Magistrate held liable in.—*See* TEMPERANCE ACT OF 1864, 2.

See COVENANT, 3. DAMAGES, 3. FALSE IMPRISONMENT. NEW ASSIGNMENT.

TRIAL AT BAR.

The court, under the circumstances of this case, refused to order a trial at Bar.—*Commercial Bank of Canada v. Great Western R. W. Co.*, 335.

TROVER.

Sale of goods—Stoppage in transitu—Trover.—The plaintiffs at Montreal, having sold goods on credit to H. & Co., living at Meaford, on Lake Huron, shipped them by the Grand Trunk Railway to Toronto, and thence by defendants' railway to Collingwood. While they were at Collingwood defendants received notice of stoppage *in transitu*, but they delivered the goods to H. & Co., who were found by the jury to have been insolvent at the time of the notice; and the plaintiffs thereupon brought *trover*.

Held, that the action would not lie, for the goods by the sale and delivery to the carriers were at the purchasers' risk, and the stoppage *in transitu* did not give the plaintiffs the right of property and possession necessary to maintain *trover*.—*Childs et al. v. The Northern Railway of Canada*, 165.

TRUSTEE.

Purchase by from cestui que trust.
—See COVENANTS, 4.

See DEFAMATION, 3. INSURANCE, 4.

USURY.

Consol. Stat. C. ch. 58—Banks—Usury—Note payable at another place.—Under *Consol. Stat. C. ch. 58*, if the authorities of a bank, being aware that a note would otherwise be made payable where it is offered for discount, procure it to be made payable elsewhere solely for the purpose of obtaining the rate allowed by sec. 5, for the expenses of collection in addition to the seven per cent. interest, the transaction is usurious and void. They are not called upon, however, to inquire as to the

reason for making a note thus payable when the parties themselves have so chosen to draw it.

Evidence of a general agreement with the bank that all notes made by defendants should be drawn payable in that form, is admissible to support a plea of such an agreement as to the note sued on.

The maker and indorser of a note sued together are admissible witnesses for each other, though they have joined in pleading.

Remarks as to the practice in this country of taking notes for discount, not from the last indorser, but from the maker, who brings them indorsed; thus suggesting not a business transaction, but accommodation indorsements.—*Bank of Montreal v. Reynolds and Sprowl*, 352.

VENDOR AND VENDEE.

Of Land.—See COVENANT, 1, 2, 4, 5, 6. ESTOPPEL, 2.

See SALE OF GOODS.

VENUE.

Action for not repairing highway—Venue—Practice.—An action against a municipal corporation for not keeping a road in repair is local.

Where such an action had been brought in the County Court of a county different from that in which the road was situate, and a verdict for the plaintiff confirmed in term, this court allowed the appeal from such judgment, but made no order, as the court below, having no jurisdiction, could not be ordered to do anything in the case.

Where the objection to venue appears on the face of the declaration, the defendant should demur; he cannot insist on a nonsuit, nor after

verdict can he arrest the judgment, the objection then being cured by the statute. If the declaration does not state the situation of the premises, it will be assumed to be of the venue in the margin, but no objection will lie unless the question of locality is brought up by the plea, so as to create a variance.—*Ferguson v. Corporation of the Township of Howick*, 547.

VERDICT.

See DAMAGES, 1.

WAIVER.

Contract—Waiver—Pleading.—Declaration, that the defendant agreed to sell and deliver to the plaintiff within one week certain wheat, and the plaintiff advanced \$600 on account, yet the defendant failed to deliver. *Plea*, that before breach it was agreed that the plaintiff should waive the delivery within one week, and the plaintiff did then waive the same, and extended the time for delivery.

Held, plea bad, for no subsequent delivery was alleged, nor that the extended time had not elapsed.—*Molson v. Bradburn*, 457.

Of right to seize under chattel mortgage.—*See* CHATTEL MORTGAGE.

Of summons in Chambers.—*See* HABEAS CORPUS.

Of conditions in insurance policies.—*See* INSURANCE, 1, 5.

Of objections to compulsory reference.—*See* INSURANCE, 7.

Of consent of shareholders when required to contract.—*See* RAILWAYS AND R. W. COS., 1.

Of notice of wrongful assessment.—*See* TAXES, 4.

WATERCOURSE.

Obstruction of in constructing railway—Action for—Limitation of Damages.—*See* RAILWAYS AND R. W. COS., 2.

See DOWER, 3. MEMORIALS.

WAY.

See RIGHT OF WAY.

WITNESS.

See HUSBAND AND WIFE, 2.

Maker and indorser of a note sued together are admissible for each other, though they have joined in pleading.—*See* USURY.

See EVIDENCE.

WORDS (MEANING OF.)

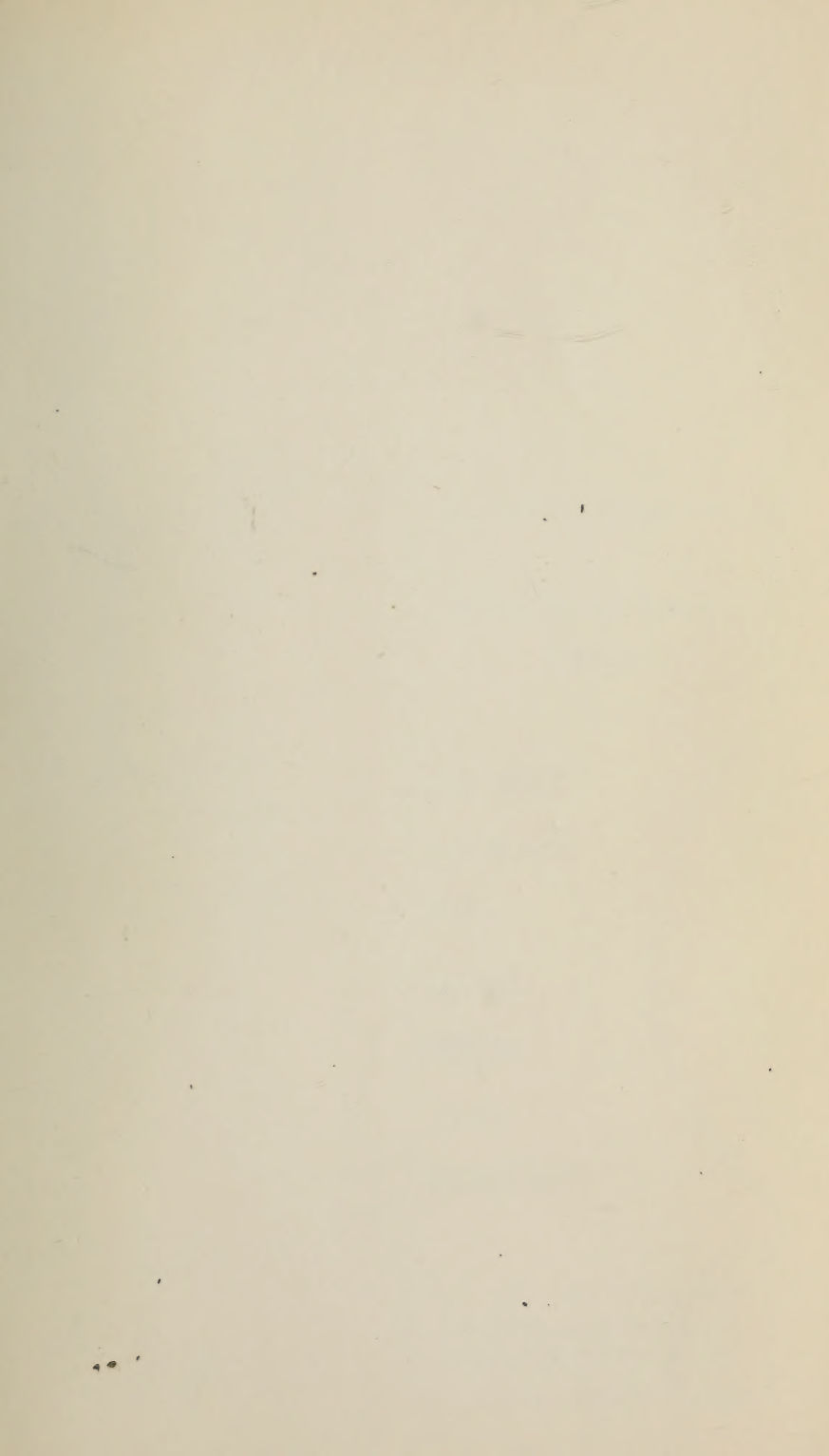
"In charge of."—*See* RAILWAYS AND R. W. COS., 4.

"Levy."—*See* SHERIFF.

"Preside."—*See* TEMPERANCE ACT OF 1864, 3.

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